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THE

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Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

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BENGAL SECRETARIAT LIBRARY.

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

In re BLUNDELL.
BLUNDELL *v.* BLUNDELL.

C. A.
1889
NORTH, J.
Dec. 20.
C. A.
1890
Feb. 5.

[1884 B. 5337.]

Administration—Costs—Indemnity against Costs.

The conduct of proceedings in an action for the administration of a testator's estate was given to the *B.* company, who were creditors. The company with leave of the judge took out a summons to compel a firm of solicitors to refund money which they had received out of the estate for costs. The summons was dismissed and the company was ordered to pay the costs of the firm. The company was afterwards wound-up by the Court, and could not pay anything. All the costs of the administration action had been paid, except the costs in respect of the summons. There remained to the credit of the action a sum not sufficient to pay either the costs of the company or the costs of the firm in relation to the summons:—

Held, by *North*, J., that the fund in Court must be paid to the liquidator of the company in part payment of the company's costs of the summons:—

Held, by the Court of Appeal, that the firm of solicitors to whom the company had been ordered to pay costs had a better equity, and that the fund must be paid to the solicitors.

THOMAS BLUNDELL died in 1882, and in November, 1884, an order was made directing the usual accounts of his estate. The Defendant was his son, *G. T. Blundell*, the only one of his executors who proved or acted. On the 30th of January, 1885, an order was made giving the conduct of the action to the *Bavarian Brewery Company, Limited*, who were large creditors of the estate.

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Messrs. *Bower, Cotton & Bower* had acted as the solicitors of *G. T. Blundell* until some time after the commencement of the action, and he had paid them out of the estate sums amounting to £1148 14*s.* 9*d.* for their costs.

By the chief clerk's certificate, filed in February, 1887, a balance of more than £2000 was found due from *G. T. Blundell* on his accounts. He shortly afterwards became bankrupt without having paid any part of this sum. On the 26th of April, 1887, an order on further consideration was made under which the costs of the *Bavarian Company* were paid.

On the 27th of April, 1887, the *Bavarian Company*, by leave of the Judge, took out a summons in their own name, asking that *Bower & Company* might be ordered to refund the £1148 14*s.* 9*d.* This summons, on the 1st of May, 1888, was dismissed by Mr. Justice *Stirling* (1), who ordered "That the *Bavarian Brewery Company, Limited*, do pay to the said *A. P. Bower, H. M. Cotton*, and *G. H. Bower* their costs of the said application and the adjournment thereof into Court, such costs to be taxed by the Taxing Master."

In May, 1888, two petitions were presented to wind-up the *Bavarian Company*, and a winding-up order was made on the 16th of June, 1888. No part of the costs payable under the order of the 1st of May was paid, and there was no prospect of anything being received in respect of them out of the assets of the company.

There was now in Court in the action a sum of about £190. The receiver in the action had passed his final account, on which £35 13*s.* 6*d.* was due to him.

Messrs. *Bower, Cotton & Bower* gave notice of motion that the costs by the order of the 1st of May, 1888, directed to be paid to them, might be declared a charge on the fund in Court in priority to all other claims, and that the applicants might be at liberty to apply for payment out of the fund in Court of so much of those costs as could not be recovered from the *Bavarian Company*.

The official liquidator of the *Bavarian Company* then took out a summons asking that out of the fund in Court the balance due to the receiver might be paid, that the costs of all parties might

(1) 40 Ch. D. 370.

be taxed from the foot of the last taxation, and paid out of the residue of the fund, and that the balance (if any) of the fund might be paid to the liquidator.

It was admitted that there were no unpaid costs of any parties to the action, except the costs incurred by the *Bavarian Company* in their application against Messrs. *Bower, Cotton & Bower*—that those costs exceeded the residue of the fund in Court after payment of the £35 13*s.* 6*d.*, and that the amount payable to *Bower & Co.* under the order of the 1st of May, 1888, also exceeded that residue.

The motion was heard before Mr. Justice *North* on the 20th of December, 1889.

Cozens-Hardy, Q.C., and *Levett*, for Messrs. *Bower, Cotton & Bower*:—

The company are entitled to be indemnified out of the funds in Court for their costs of the summons, including the costs they were ordered to pay to Messrs. *Bower, Cotton & Bower*. Their right to indemnity attaches, notwithstanding that they have not yet paid Messrs. *Bower, Cotton & Bower* in respect of those costs: *Lacey* v. *Hill* (1). Messrs. *Bower, Cotton & Bower* being entitled to be paid by the persons who are entitled to indemnity from the fund, may go to the fund direct: *In re Gorton* (2). As between the two parties having rights against the fund, the company and *Bower, Cotton & Bower*, the company having been ordered to pay *Bower, Cotton & Bower* their costs, they stand on the higher footing and will be given priority.

Everitt, Q.C., and *Edward Ford*, for the liquidator:—

The case of *In re Gorton* has no application. The contest in that case was between the trade creditors and other creditors as to who had the first right to funds employed in trade. We do not contest that as between *Bower, Cotton & Bower* and the creditors of *Thomas Blundell*, the former are entitled. But *Bower, Cotton & Bower* can only get at the fund subject to the accrued rights of the creditors of the *Bavarian Brewery Company*. They must come in and prove and stand on an equality with the

(1) Law Rep. 18 Eq. 182. (2) 40 Ch. D. 536.

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other creditors. The liquidator has the right and duty on behalf of all the creditors to allocate the funds applicable to indemnity to that part of the costs the payment of which will work equality between the creditors. If the fund in Court were more than sufficient to provide the *Bavarian Company's* own costs of the summons, we do not dispute that *Bower, Cotton & Bower* would get what was over, subject probably to returning dividends they might have received, for it would not be fair that the other creditors should get an increased dividend by reason of the company having been ordered to pay these costs.

Cozens-Hardy, in reply:—

The principle of our contention is as old as *Ex parte Garland* (1); that every case shews that a creditor in the position of *Bower, Cotton & Bower* have the double right to prove against their own debtor and to go direct to the fund for indemnity.

NORTH, J.:—

In my opinion the present claim cannot be supported. *Blundell's* estate is being administered in the action of *Blundell* v. *Blundell*. For some reason which I do not know the conduct has been taken away from the Plaintiffs and given to the *Bavarian Brewery Company*, who have had it down to the present time. In the course of the administration the parties having the conduct seem to have thought that a claim might be successfully made against Messrs. *Bower & Company*, the solicitors, and they applied to the Court for leave and got leave of the Court to take proceedings against them. The result is that the application against the solicitors has been dismissed with costs. That left the solicitors creditors of the *Bavarian Brewery Company* in respect of those costs which were not paid. Very shortly after that order was made the *Bavarian Brewery Company* went into liquidation, and the solicitors had a right to prove for their costs in the liquidation if they have not done so, and receive whatever dividend in respect of them the estate can pay.

The *Bavarian Brewery Company* has little or no assets. Unfortunately the administration of the estate in *Blundell* v. *Blundell*

(1) 10 Ves. 110.

is in the same position—there is a very small sum available to pay anybody. Under those circumstances the *Bavarian Company*, which had the conduct of the proceedings and which has since the winding-up been represented by the liquidator, has incurred certain costs subsequent to the last costs which were paid. Those costs were costs arising out of the proceedings under this claim against the fund in Messrs. *Bower & Company's* hands, which claim failed; but now the matter stands in this way, that they are the only persons entitled to anything in that suit, and it is admitted the sum due to them for costs would not be forthcoming,—it is admitted that the *Brewery Company's* costs would beyond all question be more than the small sum available to pay them. There is, I should mention, a claim on behalf of the receiver which clearly has to be provided for first, and what is left is admittedly not sufficient to meet the claim of the liquidator of the *Bavarian Brewery Company* in respect of his costs in the proceedings. If the estate were solvent the right of the *Bavarian Company* or its representative would be to receive from *Blundell's* estate their own costs subject to taxation, and also a right to be indemnified out of that estate in respect of any costs they had to pay to other parties—I say had to pay, not paid, because I do not think a liability necessarily attaches only on payment of costs. If they had not obtained leave to take proceedings on behalf of the estate they would not have got them except under very exceptional circumstances, but having had that leave they probably would get them subject to this remark, that the leave given is not in terms to take proceedings at the expense of the estate, because that might lead to the incurring of costs on a very extravagant scale, and it also might turn out that no proceedings ought to have been taken. So that, although generally speaking a person taking such proceedings is indemnified against costs incurred, yet it is not necessarily the case. But no such order has been made in this case, and in point of fact it is unnecessary to consider it, because the sum available to pay the admitted claim of the *Brewery Company* in respect of the costs of that action is not sufficient to pay that amount. Under those circumstances it does not seem to me to be necessary to consider whether there would be a right to the indemnity

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over in case there were funds available to meet it. In case there was any right to receive the sum payable in respect of the costs of Messrs. *Bower & Company* the Court would take care that it got ultimately to their hands—it would look to that; but I do not see any right those gentlemen have to say that the *Bavarian Company* should set up as their first claim against *Blundell's* estate the right to indemnity in respect of costs they have to pay to somebody else, but have not paid, and leave entirely unprovided for the claims of the company and its liquidator in respect of their own costs properly incurred in that action. The result would be if I were to accede to the present application I should be saying that the *Bavarian Company*, who have taken proceedings on behalf of the estate at the instance of the estate, are not to receive their costs of so doing because the persons against whom they took proceedings ought to be considered first, and their claim absorbs the whole amount. None of the cases cited to me justify that, and in my judgment therefore the application fails. That motion, therefore, must be dismissed with costs.

D. P.

C. A.

Messrs. *Bower & Co.* appealed. The appeal was heard on the 5th of February, 1890.

Cozens-Hardy, Q.C., and *Levett*, for the appeal:—

The question is whether we have not a better right to be indemnified than the *Brewery Company*. We are substituted to their right of indemnity in priority to them. The cases under the *Companies Act* support our contention. In the case of *Ex parte Smith* (1), it was held that the solicitors of a person against whom the liquidator of a company had brought an unsuccessful action were entitled to their costs out of the assets of the company on the ground that the company was really the plaintiff, and the same principle was laid down in wide terms in *Bailey & Leetham's Case* (2). The question of the priority of such a claim was first raised in *In re Home Investment Society* (3), and again in *In re Dominion of Canada Plumbago Company* (4). These

(1) Law Rep. 3 Ch. 125.
(2) Ibid. 8 Eq. 94.
(3) 14 Ch. D. 167.
(4) 27 Ch. D. 33.

authorities lay down a clear rule in winding-up cases, that the person having a claim against the liquidator for costs is entitled to payment in priority to the costs of liquidation, and we ask the Court to apply here the principle enunciated by Vice-Chancellor *James* in *Bailey & Leetham's Case* (1).

Everitt, Q.C., and *Edward Ford*, for the liquidator:—

The Appellants put the case as one of subrogation; but they are asking more than subrogation—they ask to be paid in priority to all other claims. And why? They took an order for costs against the company personally and were satisfied with it. The lien of the liquidator's solicitor ought not to be displaced. In *In re Dominion of Canada Plumbago Company* (2) there had been an order upon the liquidator to make a payment with liberty to him to recoup himself out of the assets, and after that had been done an attempt was made to undo it in order that another person might get his costs. The liquidator was in the same position as if the money had been paid to him under an order of the Court. In *In re Home Investment Society* (3) no sanction had been given by the Court to the proceedings. In *Bailey and Leetham's Case*, the Court gave leave to bring an action, and considered that, as it had sanctioned it, the costs which were incurred with a view to the benefit of the estate should be paid though it was unsuccessful; but no case lays down any rule that because the Court directs a person to be sued he shall have a lien for his costs; subrogation is only allowed for the purpose of working out an indemnity. Suppose there were costs of the Plaintiffs incurred before the conduct of the action was given to the company, could it possibly be contended that they should be postponed? If a trustee brings an unsuccessful action for the benefit of the trust estate, has it ever been heard that the other side can claim against the trust estate? There is no case where a lien for costs has been interfered with in favour of an adverse litigant. An order for payment to a party does not take away the solicitor's lien: *Ex parte Bryant* (4).

(1) Law Rep. 8 Eq. 94.
(2) 27 Ch. D. 33.
(3) 14 Ch. D. 167.
(4) 1 Madd. 49.

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[LINDLEY, L.J., referred to *In re Johnson* (1).]

Cozens-Hardy, in reply:—

Mr. Justice *North* considered that we had a right to indemnity, the only question was as to priority where executors carry on business by the direction of the testator, persons who deal with them have not only a remedy against the executors, but a claim against the assets employed in the trade: *Ex parte Garland* (2). We have two persons entitled to indemnity out of the fund, and one of them has been ordered to pay the other; is the latter to be held to have the worse equity?

[COTTON, L.J.:—Your difficulty is that you can only get indemnity by putting yourself in the place of the adverse claimant.]

The company cases which have been cited help us on that point.

[COTTON, L.J.:—There is no direction here that the *Bavarian Company* shall pay the costs out of the estate.]

The mere fact that the order does not contain a direction which is not put in for the benefit of the adverse claimant, but for the protection of the person taking the proceedings, cannot be held to make any difference in the position of the adverse claimant.

COTTON, L.J.:—

This case comes before us on appeal from Mr. Justice *North*, and if there had been any authorities closely bearing upon it I should have wished to consider them before giving judgment; but it is agreed on both sides that there is no direct authority on the point, though various decisions have been referred to as shewing what is right to be done if it can be done consistently with legal principles. The Judge gave the conduct of this action, which is for the administration of the estate of *Thomas Blundell*, to the *Bavarian Brewery Company*, who were large creditors of the estate, and are now being wound up. That company in the

(1) 15 Ch. D. 548. (2) 10 Ves. 120.

course of the action took proceedings against Messrs. *Bower & Co.* to compel them to refund moneys received by them for costs, and it is admitted that all steps in those proceedings were taken with the sanction of the Judge in Chambers. Those proceedings failed, and the summons of the *Bavarian Brewery Company* against Messrs. *Bower & Co.* was dismissed with costs, which costs have not been paid, and the company has gone into liquidation, and has no assets to pay them. The only costs of the company incurred in this action which have not been paid are their costs of these unsuccessful proceedings, and the question now is, whether those costs ought to be paid out of *Blundell's* assets, which are not sufficient to pay in full either those costs or the costs of Messrs. *Bower & Co.* No question arises as to the costs incurred by the company in getting in the assets or in the administration of the estate generally. The only question is, whether they are entitled to be paid their costs of the proceedings against Messrs. *Bower & Co.* in priority to the costs incurred by Messrs. *Bower & Co.* in resisting them. The order of the Judge giving the company leave to take out the summons in their own name is unusual, the ordinary course being to give leave to use the names of the executors. This peculiar form of order shews an intention to substitute the company for the executors, and we may treat them as standing in the shoes of the executors. The steps they took were taken with the approval of the Judge, so they have a right to indemnity; but the question is whether they have a better claim than Messrs. *Bower & Co.* It is urged against the latter that they elected to take an order giving them their costs as against the company, and, therefore, cannot now have any remedy against the estate. I think that contention is wrong. There are cases where a liquidator is ordered to pay costs, and has been held entitled to get them out of the estate, and pay them out of it to the persons to whom they are ordered to be paid. It is said that there cannot be a remedy against the company personally and also against the testator's estate. But that is not so. There is in many cases a double remedy. Take the case where executors carry on a trade under directions in their testator's will. Persons who deal with them and supply goods are not creditors of the testator, but though

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they have a personal remedy against the executors, they are held to have the same claim against the assets as the executors have. If the assets authorized to be employed in the trade are limited, so is their claim. There is, therefore, nothing unreasonable in the idea of Messrs. *Bower & Co.* having a double remedy.

In the present case there is this difficulty. The solicitors can only claim by getting the benefit of the indemnity to which the company would have been entitled if they had paid these costs. Mr. Justice *North* said it was unnecessary to say whether they were so entitled; but as every step was taken with the sanction of the Judge, and therefore must be assumed to have been properly taken, they were entitled to say to the Court, pay out of the estate the costs which we have incurred, and the costs which we have been ordered to pay in these proceedings. The costs they have been ordered to pay have not been paid, and they are entitled to be indemnified against the payment. It is not an unusual way, and it is the best way, of giving indemnity, to pay the demand out of the estate instead of letting the parties claiming indemnity pay, and then refunding the amount to them. Here we have this novelty, that the company who are entitled to indemnity, and Messrs. *Bower & Co.* who are entitled to get the benefit of their indemnity, are both coming to claim. But the company was ordered to pay costs to Messrs. *Bower & Co.*; so which of the two parties has priority? I think that Messrs. *Bower & Co.* have it, and that the costs of the company must be postponed. I think, therefore, that the decision under appeal ought to be reversed, and that we ought to order payment to the Appellants of the sum which Mr. Justice *North* ordered to be paid to the liquidator.

It has been urged that Messrs. *Bower & Co.* cannot claim against the assets which ought to go to pay creditors. I think we are not called upon to consider that point, the contest being only between these two parties. I feel no difficulty, however, in postponing the claims of creditors. The Court has done what it could against Messrs. *Bower & Co.* with a view to increase the assets; the claim made against them was unsuccessful, but that is only a misfortune which cannot take away the right to indemnity against costs which, having been incurred under the direc-

tion of the Judge, must be taken to have been properly incurred. The claim failed, but I cannot say that it was one which it was unreasonable to make.

LINDLEY, L.J.:—

The question is how a sum of less than £200, constituting the only undistributed assets of *Thomas Blundell*, the testator in the cause, is to be disposed of. All the costs incurred in obtaining it have been paid, and the estate has been cleared of every liability except the claims which are now before us. The difficulty arises in this way. It was thought that Messrs. *Bower & Co.* were indebted to the estate, not legally, but equitably, and that if proceedings were taken against them a sum could be got in to the benefit of the estate. The conduct of the cause had been given to the *Bavarian Brewery Company*, who were large creditors, and they obtained leave to take proceedings against Messrs. *Bower & Co.* The summons which they took out was dismissed on the merits; but the Applicants acted under the direction of the Judge in Chambers, and it is not suggested that there was any impropriety or irregularity in the proceedings. What then ought now to be done? The brewery company are entitled to indemnity out of *Blundell's* estate, and Messrs. *Bower & Co.* are entitled to be paid their costs by the company. It is clear that Messrs. *Bower & Co.* have a right against the company, but they claim something more, and I think they have an equitable right to stand as creditors against the assets according to the principle acted upon in *Ex parte Garland* (1), and *In re Johnson* (2).

Creditors of the trustees in dealings carried on in pursuance of the trust are not *cestuis que trust*, but they have a right to the benefit of the right of the trustees to indemnity, and the principle applies here. The contest is only between Messrs. *Bower & Co.* and the company, and as Messrs. *Bower & Co.* have a personal claim against the company for the costs which the company have been ordered to pay to them, I think they have a better equity against the fund. The winding-up cases referred to by the Appellants bear closely on the present case.

(1) 10 Ves. 120. (2) 15 Ch. D. 548.

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LOPES, L.J.:—

I am of the same opinion, and have nothing to add. The principle of *In re Home Investment Society* (1), and *In re Dominion of Canada Plumbago Company* (2), appears to me to govern the case.

Solicitors: *Bower, Cotton, Bower; W. Foster.*

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[1888 R. 942.]

Easement—Exclusive Use of Gateway—Absolute Ownership.

M. and others were owners in fee of a house fronting a street, and also of a yard and premises in rear of the house. A covered passage or gateway led from the street through the house to the premises in the rear. They conveyed the premises in the rear "together with the exclusive use of the gateway," which was described by its dimensions, to *W.* in fee:—

Held, affirming the decision of *Kekewich*, J., that *W.* was entitled not merely to a right of way through the gateway, but to the use of the gateway for all lawful purposes.

Semble, such a right amounted to the ownership of the space within the gateway.

AT the date of the conveyance next mentioned *C. W. Manningham* and others were owners in fee simple of certain houses on the south side of *Oxford Street*, including No. 277, and certain premises used as stables in the rear of those houses.

Through the house, No. 277, there was a gateway, used as a passage for horses and carriages from *Oxford Street* to the stables in the rear. There was a vault underneath the gateway and rooms above it, which formed part of No. 277.

By indentures of lease and re-lease, dated the 9th and 10th of July, 1839, the freeholders conveyed to *S. Wimbush* in fee the stables at the back and the use of the gateway under the description of "All that piece or parcel of ground and all the messuage or tenement and other buildings erected and built thereon, situate,

(1) 14 Ch. D. 167. (2) 27 Ch. D. 33.

standing, and being on the south side of *Oxford Street* in the parish, &c., containing in length from east to west on the north side thereof, 30 ft. 11 in.; from north to south on the east side of the gateway, 41 ft. 6 in.; then, returning from east to west across the said gateway, 12 ft. 9 in.; then returning from south to north on the west side of the said gateway, 8 ft. 6 in.; then continuing from east to west, abutting on the back fronts of three newly erected houses in *Oxford Street*, 32 ft. 8 in.; then returning from north to south on the west side, 90 ft.; then returning from west to east on the south side, 79 ft. 3 in.; then returning from south to north on the east side, 88 ft. 11 in.; then returning from east to west, 3 ft.; and, lastly, from south to north, abutting on premises in *Oxford Street*, 27 ft. 9 in.; together with the exclusive use of the said gateway into *Oxford Street*, being 10 ft. 11 in. in the clear on the north side, 11 ft. 7 in. on the south side, in depth, 41 ft. 6 in., and in height 15 ft., be the said several dimensions, little more or less; which said piece of ground and premises are more particularly delineated and described by the portion on the plan thereof drawn in the margin of these presents coloured pink; together with all houses, &c., walls, ways, watercourses, &c., easements, advantages, rights, remedies, and appurtenances, whatsoever to the said messuage, hereditaments, and premises, or any part thereof belonging or in any wise appertaining."

The gateway or entrance was not coloured on the plan referred to.

On the 22nd of June, 1861, the house, No. 277, *Oxford Street*, was demised by the freeholders to *E. M. Reilly*, "together with the vault underneath the gateway on the east side of the premises leading to the yard and stabling now in the occupation of Mr. *S. Wimbush*," for twenty-one years; and the term was subsequently renewed till 1903.

In the year 1875 the land in the rear of the houses was covered in, and converted into a skating rink; and the cobble stones with which the floor of the gateway was paved were removed, and the floor paved with tiles. The premises were subsequently used as a meat market.

On the 6th of October, 1885, the premises in rear of the houses, "together with the entrance by a passage thereto," were demised

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by the person entitled under the indentures of the 9th and 10th of July, 1839, to the Defendant, *William Booth*, to be used as a *Salvation Army Hall*, for the term of fifty-three years from the 24th of December, 1884, less the last seven days.

The action was brought by *E. M. Reilly* and the present owners of the reversion, complaining that the Defendant had, among other things, fixed matchboarding along the roof of the entrance; that he had fixed up in the front, facing *Oxford Street*, and extending above the roof of the entrance, and leaning on the Plaintiffs' house, a large transparency, lighted at night by a row of gas lights, advertising the objects of the *Salvation Army*; that he had fixed unseemly gas lamps on the outer gates; that he had painted texts and other inscriptions on the walls of the entrance, and had placed in the entrance a book-stand at which books, newspapers, and tracts were sold; in short, that he had converted the entrance into a room or shop, and used it not in exercise of a right of way but as if it was his own. The Plaintiffs claimed a declaration that the Defendant was not entitled to use the entrance otherwise than in exercise of a right of way, and an injunction and damages.

The Defendant pleaded several defences, but chiefly relied upon the construction of the deed of the 10th of July, 1839, under which he was entitled to "the exclusive use of the gateway," and he contended that he was justified in using it as he had done.

The action came on for trial before Mr. Justice *Kekewich* on the 15th of July, 1889.

Barber, Q.C., and *Maidlow*, for the Plaintiffs:—

Upon the true construction of the deed the Defendant is only entitled to an easement, and not to the ownership of the passage. The soil is not conveyed to him. An "exclusive use of gateway" means a right of way through the gate to and from the premises at the back, and no more. The use of the way is conveyed, and that only, and not the use of the land or of the walls. The acts of which we chiefly complain are, the lowering of the archway by matchboarding the ceiling, the fixing a book-stall in the passage, and the fixing of a transparency at the entrance

of the gateway. All these are acts of trespass which we, as the owners in fee of the soil, are entitled to restrain.

Warmington, Q.C., and *Sargant*, for the Defendant, were not called upon.

KEKEWICH, J.:—

To my mind all the evidence I have heard to-day, and all of it has been of an extremely thin character, is wholly unnecessary, because I think the Plaintiffs' position is wrong on the construction of the deed of July, 1839. It was because I thought the decision must turn upon that ultimately that I pressed Mr. *Barber* to throw his weight into the words of the deed, and give me all the assistance he could in ascertaining what was the meaning of the language. I then pointed out to him that the first thing to ascertain was, what is the meaning of "the gateway." The expression is used, in the first instance, without any words of introduction, and without anything to tell what it is. I am not sure that, as a matter of construction, I am entitled on that part of the deed to look at the plan which is afterwards referred to, because the gateway is not part of the plan, though it is shewn on the plan which is coloured and lettered; and there might be considerable difficulty in knowing what the gateway is at that point—that is to say, where it first occurs in the parcels. But I think this is reasonably clear, apart from anything else, that it means a piece of land. The very manner in which it is used, having reference to the plan, that it is north to south on the east side of the gateway 41 ft. 6 in., shews that it is not merely the entrance to the gate through which there is a way, but the whole piece of land, one side of which is 41 ft. 6 in. Then passing on, and omitting the reference to "the said gateway" where it occurs, we come to the grant of this particular thing, "together with exclusive use of the said gateway into Oxford Street"; and then we have the description. "The said gateway into *Oxford Street*" is 10 ft. 11 in. clear on the north side of the premises, according to the plan, and no doubt in fact ran north to south, 11 ft. 7 in. on the south side, in depth 41 ft. 6 in., and in height 15 ft. Leave out the height, 15 ft., and you have a description as

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accurate as you can find in any parcel in any deed of a piece of land. That is to say, you have the two heads of the parallelogram, the north and south, and you have the other two sides, which are of equal length. Unless, therefore, there is something to control it, there can be no question that it is a description of a piece of land. Then you bring in the height of 15 ft., which is not usual in a description of a piece of land, and which must be used for some other purpose. Of course, it is used to describe the limit of the grant. If there had been a conveyance of "the said gateway," with those dimensions before mentioned, and without the height of 15 ft., it would have conveyed the whole of the soil from as far as you can go downwards to as far as you can go upwards. That was not intended to be conveyed, because above this piece of land there was ownership not intended to be conveyed to the grantee, and below there was a vault which was equally not intended to be conveyed, and the draftsman would have been in error if in any way he used language which described the ownership of the soil. Therefore he introduced into this description the statement of the height also. About that there seems to me on the deed to be really no doubt, any more than that there is no conveyance of this piece of land itself and that the only land conveyed, so as to vest the fee in the ordinary sense in the grantee, is that coloured pink on the plan. Under these circumstances, what is the meaning of "together with the exclusive use of the said gateway," or, as I construe it, together with the exclusive use of such and such a piece of land? I know no reason why a person seised in fee may not grant to another person the exclusive use for all time by apt words of a particular piece of land. The deed may possibly reserve the soil in the grantor, but there is no reason why there should not be a grant of such an exclusive use, nor to my mind is there any reason why, when you find the grant of such an exclusive use, the Court should construe it otherwise than as a grant of the exclusive use of that piece of land. The only possible answer is, that it is not a piece of land, but a gateway, and because it is the exclusive use of the gateway, therefore it must be of the piece of land to be used as a way. To my mind, that is introducing words which are not to be found and cannot be fairly got out of the language of the deed. If it

had been intended to describe that sort of user, nothing could have been easier. No doubt, in a later deed of 1875, this has been described as a right of way so many feet high. That is quite inadequate. You cannot have a right of way described as so many feet high. And it cannot alter the construction of the deed of 1839, which in my judgment gives the grantee of that deed and those claiming through him the sole right to use this area for any purpose whatever, not being of course an illegal purpose, and not being one that can be restrained as a nuisance, or anything of that kind. If he were restrained from committing a nuisance, or anything of that kind, it would be by reason of the Common Law, and not by way of construction. The Plaintiffs ask that it may be declared that the Defendant is not entitled to use the said entrance other than in exercise of the right of way. The other relief by way of injunction is merely consequential. I am of opinion that the Defendant is entitled to use the said entrance otherwise than as a right of way. Therefore the Plaintiffs' case fails, and the action must be dismissed with costs.

H. L. F.

From this judgment the Plaintiffs appealed. The appeal came on to be heard on the 17th of January, 1890.

S. Hall, Q.C., and *Maidlow*, for the Appellants:—

The right of the Defendant is only a right to use the gateway as a means of access to the premises in the rear. He has an exclusive right of way, but he cannot use it for other purposes. The word "gateway" has two meanings: it means either a way through a gate or the edifice of the gate itself: *Ogilvie's* Imperial Dictionary; *Webster's* Dictionary. Here it is clear that it meant the way through the gate. The edifice was part of the house which was not included in the grant, and is not coloured in the plan. The object of giving the dimensions in the grant was to prevent the right being encroached on by narrowing or lowering the arch, so as to prevent loaded carts from passing through. The grant of an exclusive use of an easement does not give an absolute interest in the servient tenement, just as a grant of an exclusive license to use a patent does not pass any property in

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the patent: *Heap* v. *Hartley* (1), and a grant of exclusive use of pleasure-boats will give no right of property in the boats: *Hill* v. *Tupper* (2); *Harrison* v. *Parker* (3); *London Taverns Company* v. *Worley* (4), where there was a grant of "an exclusive right of gateway under part of the tavern." To hold that the Defendant in the present case has an absolute right to the space included in the gateway would be to give him the freehold in it, which is quite contrary to the intention of the parties.

[COTTON, L.J.:—Might not the grant be construed on a covenant by the grantors with *Wimbush* that he might use the gateway for any lawful purpose not inconsistent with the size and form of the gateway?]

We submit not; but if it could be so construed, such a covenant would not pass to the assignees or lessees of *Wimbush*. It would be a mere personal covenant: *Rowbotham* v. *Wilson* (5). We contend that the actions complained of are in excess of the easement granted, and that if they are allowed to continue the Defendant might give a right to continue them by prescription.

Sargant, for the Defendant:—

We rely mainly on the construction of the deed of conveyance to *Wimbush*, but we also contend that we have acquired a right by prescription to do the acts complained of, and if we should fail on the first point we ask to be allowed to give evidence on the second point, although it was not gone into in the Court below, as the Judge decided in our favour on the question of construction.

S. Hall objected that the Defendant had waived his right to give evidence in the Court below, and that he could not now produce it.

COTTON, L.J.:—

We will hear the arguments as to the construction of the deed

(1) 42 Ch. D. 461.
(2) 2 H. & C. 121.
(3) 6 East. 153.
(4) Before *Kekewich*, J., July 21, 1887; before the C. A., Nov. 24, 1888; not reported.
(5) 8 H. L. C. 348.

and will then, if necessary, consider the question whether the Defendant has precluded himself from going into evidence.

Sargant:—We do not claim the right to the soil under the grant, but the right in fee simple of the space within the limits of the gateway, like the right to chambers in the Inns of Court, which is an inheritance, although the chambers above and below belong to other persons: Co. Litt. (1). The grant of exclusive use gives the fee simple in this space, as the grant of all the profits of land passes the land itself: Co. Litt. (2). Whether the Defendant has the legal fee or not, he has the equitable fee and can use the space for any lawful purpose. The description in the deed by metes and bounds shews that a corporeal hereditament was intended and not a mere easement; and it is included among the parcels, not among the rights and easements appurtenant to them: *Willis* v. *Watney* (3). But if an easement only is granted, that easement is sufficient to justify what the Defendant has done. There is no limit to the extent of easement which may be granted, and this is an easement for all lawful purposes: *Gale* on Easements (4); *Cannon* v. *Villars* (5); *Allan* v. *Gomme* (6); *Henning* v. *Burnet* (7); *Watts* v. *Kelson* (8); *Rabbeth* v. *Squire* (9); *Mannox* v. *Greener* (10); *United Land Company* v. *Great Eastern Railway Company* (11).

S. Hall, in reply.

COTTON, L.J.:—

This is an action about apparently a small matter, but the action may be of some importance even if the matter complained of is small, because if the Defendant has not got the property in this passage or gateway, he may acquire it by acts which are complained of by the Plaintiffs here.

I cannot say that the deed of conveyance of the 10th of July,

(1) 48 b.
(2) 4 b.
(3) 51 L. J. (Ch.) 181.
(4) 6th Ed. pp. 318, 319.
(5) 8 Ch. D. 415.
(6) 11 Ad. & E. 759.
(7) 8 Ex. 187.
(8) Law Rep. 6 Ch. 166.
(9) 4 De G. & J. 406.
(10) Law Rep. 14 Eq. 456.
(11) Law Rep. 10 Ch. 586

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1839, is a very careful bit of conveyancing, but still we must decide what is the result of the conveyance. The property was on the south side of *Oxford Street*, and part of it consisted of houses facing the street. Through one of the houses there was a passage —I will use the word passage so as not to introduce the word "gateway," which has been so much discussed—which went through the ground floor of one of those houses from the street to a large stable built by Messrs. *Wimbush*. The difficulty arises as to what right was granted to *Wimbush*, and those who claim from him in this passage—or gateway, as it is called in the deed—leading to the stables which were undoubtedly granted to *Wimbush*. There was a conveyance to *Wimbush* in fee of the property in the rear of the houses under the description of "All that piece or parcel of ground, and all that messuage or tenement and other buildings erected and built thereon, situate, standing, and being on the south side of *Oxford Street*." Then the dimensions are given; I need not read that, except to point out that in describing the width of the parcels which are clearly conveyed in fee to *Wimbush*, there is a reference to that part of them which goes across the gateway, and there it is recognised as the gateway, as some physical thing there which is to be recognised, and which is important in describing the metes and bounds of the back portion of the property which has been conveyed in fee simple to *Wimbush*. After giving the description of the parcels the deed proceeds, "together with the exclusive use of the said gateway" —for the gateway had been already referred to for the purpose of defining the length of the boundaries—"into *Oxford Street*, being 10 ft. 11 in. in the clear on the north side, 11 ft. 7 in. on the south side, in depth 41 ft. 6 in., and in height 15 feet, which said piece of ground and premises are more particularly delineated and described by the portion on the plan or ground plot thereof in the margin of these presents coloured pink." The portion which is undoubtedly conveyed in fee simple is coloured pink on the plan, but the portion occupied by the gateway or passage from the stables of *Wimbush* into *Oxford Street* is not coloured at all. Then there are general words, "Together with all and singular houses, outhouses, buildings, walls, ways," &c.

What interest is conveyed in that gateway to *Wimbush* by this

deed? It is contended by the Plaintiffs that there is a right to use that passage simply for the purpose of a way from the stables into *Oxford Street*, and from *Oxford Street* into the stables. As far as I can see their argument depends on two things, first, that it is "the exclusive use" of the gateway into *Oxford Street*; and, secondly, that the words are not added in the ordinary way of adding to parcels a part of which has been already enumerated, but in the form "together with the use of the gateway." In my opinion one cannot by the mere reference to this as a gateway confine it to the use for the purposes of a way. It is "the exclusive use." It is not "the use for the purpose of getting into *Oxford Street*, or from *Oxford Street* into the stables," but "the exclusive use of the gateway into *Oxford Street*." In my opinion the use of the gateway is not to be restricted to a use for the purposes of a way. It is called here a gateway, and I have sometimes called it a tunnel, but I would rather call it a passage through this house. It is defined as an existing thing, called by that name, and to give the exclusive use of an existing thing, though it may be called a gateway, does not in my opinion convey this restriction that it is to be used only for the purpose of a way. It is not to use the right of way through the gateway, but it is "the exclusive use of the said gateway." Then we find in the parcels that particular thing called the gateway is described by height, by length, and by width. In my opinion that is inconsistent with the term "gateway" being used so as to limit the use to which that which was described was to be put. Although in this deed the words are not very apt, yet there is nothing in them which can enable us to restrict the exclusive use which is granted in fee to *Wimbush*. No one else had any right or interest in this for ever; the exclusive use is granted to him in fee, and the grantors retain no interest in that use of it at all. They only had a use in the walls, the ceiling, and the floor, because they had a shooting-gallery underneath the floor, and they had the rooms of a house above, and they had on one side certainly the house which was afterwards *Reilly's*. Therefore they had an interest in the floor, in the ceiling, and in the side walls. Of course they had a right with respect to the wall on the east side, and also

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with respect to the house belonging to them for support of that portion of the house which was built over the passage and supported by that wall. In my opinion it would be wrong to say that there is anything to restrict the user. They can use it in any way and employ it for any purpose not inconsistent with the right of their neighbours, or with the right of the public. Therefore we must consider this as intended to be not only exclusive, that is excluding others, but a right to use this passage which is called a gateway, for any purpose which the law will allow, and which does not interfere with the rights of their neighbours.

It is said that will be granting a new kind of easement not known to the law. There would be a difficulty, I think, in granting by way of easement the right to use, not defining it in any way, a gateway or passage. I do not at all think, even if this is a mere grant of easement, it would be right to give it a narrower construction than if it were a covenant on the part of the grantor that this passage might be used by *Wimbush* for any lawful purpose to which it might be applicable. I should not myself be willing to assist, by way of injunction, the Plaintiffs if there was a covenant, of which they had notice, that the grantee *Wimbush*, through whom the Defendant claims, was to be at liberty to use that for any lawful purpose, or for any purpose for which it could be used without any interference with the rights of neighbours. But it may be, and I think this is probably the true construction of it, that the grant of an exclusive use for ever of this passage does convey the property in that passage. Of course, that would give rise to questions which we have not now to decide, because all we have to decide is whether anything is now being done of which, in that view, the Plaintiffs could complain; but it may be that this is a grant of this portion of the house, just as there might be a grant of a set of chambers, which would give a right to the chambers with certain restrictions to the use of the walls, the ceiling, and the floor. It is not necessary, and I think it is undesirable, as the question does not arise here, to decide what are the rights when a person has a set of chambers conveyed to him, as regards floors, walls, and ceilings, but it is clear that he cannot do anything to interfere with the rights of his neighbours

which still exist, notwithstanding the grant of that particular portion of the house.

What we have to consider is this: whether looking to this as a grant for ever of a use for all purposes of this portion of the building which is now occupied by *Reilly*, or looking upon it as a conveyance of the property, the Defendant has done anything of which the Plaintiffs can complain. My view is that it is a conveyance really of the property in that passage which is as described. It is said that on the plan this passage is not coloured. I think the reasonable answer as regards that has been given by Mr. *Warmington*, that this was not a conveyance of the property in that portion of the building so as to give the right to the soil down below, and so as to give the right to the air going upwards over that, because that was, as we know, dealt with in a contemporaneous deed. In the conveyance to *Reilly* of the building now occupied by him there were some rights given to him below and some rights given to him in the house over that passage, and so it would have been wrong to have coloured this in the conveyance to *Wimbush* as the rest of the plan, which would intimate that there was an absolute conveyance of this piece of the building, giving the right to the ground below and to everything above this passage.

That being my view of the true effect and construction of this deed, has anything been done here of which the Plaintiffs can reasonably complain? If anything has been done which would injure the walls so as to prevent the walls supporting the building above, if anything had been done to the ceiling or roof so as to prevent that supporting what was above, or if anything had been done to the ground so as to cause injury to the shooting-gallery which was below, the Plaintiffs, in my view, have a right to complain. The putting up the dado and the lights which have been affixed is not shewn to have been done in such a way as to cause any interference with the support or anything else which the Plaintiffs or any owners of the house on the side above and below were entitled to complain of. The only thing, in my opinion, which the Plaintiffs have a right to complain of—I mean by that, to call upon the Court to interfere in respect of—is that the transparency, which extends down over part of the

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gate, is fixed by screws to that part of the house which clearly belongs to *Reilly*. In my opinion that is wrong. I think the Defendant ought to undertake that those screws affixed to the house of *Reilly* should be removed, and the transparency should be brought down so as to cover only the passage, and not to cover any portion of the house belonging to the Plaintiffs. The matter is a very trifling one, although I agree it was an excess by the Defendant of any right which was granted to him. If that is done, I do not think we ought to make any other order in favour of the Plaintiffs. In my opinion the substantial question is whether the Defendant is entitled only to a limited user of this passage, so as to enable him to go out into *Oxford Street*, and to go in from *Oxford Street*. As to that, I think the Plaintiffs are wrong. That was the substantial question; but we ought to deal with it so as to prevent it being said that we allowed the Defendant to do what was in excess of the rights which in our opinion he possesses under the deed of 1839.

LINDLEY, L.J.:—

I have studied this deed of 1839 and the map annexed to it with all the care I could, and the conclusion to which I have arrived is that there are not sufficient grounds to authorize us judicially to limit the exclusive use of the gateway which is granted to those through whom the Defendant claims. The words of the grant here are very different from the words of the grant which we had not very long ago, in *London Taverns Company* v. *Worley* (1), which were "the exclusive right of gateway." There is nothing here about any right as distinguished from use.

Now the first thing to ascertain is, what is meant by the word "gateway." Gateway is an ambiguous word. It may mean a right of passage, it may mean a place, and in this particular deed it appears to me that gateway is used to denote a place, a strip of land, the dimensions of which are given. It is obviously so used to my mind in the first place in the deed where it occurs. When we have a grant of the exclusive use of the gateway leading into *Oxford Street*, and then the dimensions given, it appears to me that which is now conveyed is the

(1) Nov. 24, 1888. Not reported.

exclusive use of that strip of land the dimensions of which are there given, and which is denoted by the word "gateway." It is said that we ought to construe the use of the gateway as the use of a way, and that it is a mere easement. That, to my mind, is to limit without sufficient warrant or justification the words used in the grant. It was pressed upon us by Mr. *Hall*, very ingeniously, that if we construe the grant as the grant of the exclusive use for all purposes it involves the ownership, and he says that is inconsistent with the manifest intention of the parties, as is to be gathered from the deed and the map. I thought there was a great deal in that, but the more I think of it the less I am disposed to attribute to it the weight which he desires. The grantor has granted the exclusive use of this gateway, and if, in order that the grantee may enjoy the exclusive use of the gateway, it is necessary for us to say that the grantee has got the ownership of the gateway, so be it. That may be the necessary legal consequence. I am not sure that is not so. I rather think it is. The inferences to be drawn from the map are explained in this way. It is quite obvious that the grantor, assuming that a grant of this gateway as a corporeal hereditament, was not granting it to the same extent as he was granting the yard at the back; he was granting the yard at the back in the ordinary way, without limit up or down. He was not granting this gateway in the same way at all: he was not granting it above or below. He was reserving to himself that which was above it, and he was reserving to himself that which was below it. That is a sufficient reason for not colouring the gateway in the plan in the same way as the land which was at the back, which was granted, and which was coloured. That appears to me to remove what at first seemed a strong argument that the gateway is not coloured in the plan.

Now if we look at the matter we must see what has been granted and what has been reserved. What has the grantor granted? He has granted the exclusive use of the gateway which I have mentioned. What has he reserved? In terms nothing; but by necessary implication he has reserved a right of support in that part of the house which is over the gateway, and a right to support, so far as the floor goes, of that part

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of the house which is under the gateway. There is nothing said about it, but that follows as a necessary implication, and it appears to me these rights which he necessarily has reserved impose the only limit to that which is granted.

That being so, I think the Plaintiffs are asking us to impose a limit which cannot be justified, and that the Defendant is not exceeding his rights, except as regards the transparency. So far as transparency is not in the gateway it is in the wrong place, and must be removed.

LOPES, L.J.:—

In the year 1839, there was a conveyance to *Wimbush*, which conveyance we are called upon to construe, and it becomes material to my mind to consider in the first place what the state of the property was in 1839. There was this large yard, and there was this passage leading from *Oxford Street* into the yard, and from the yard into *Oxford Street*. Then in the deed of 1839 certain parcels are conveyed to *Wimbush* which beyond all question he takes absolutely, and then follow these important words: "Together with the exclusive use of the said gateway into *Oxford Street*, being 10 ft. 11 in. in the clear on the north side, 11 ft. 7 in. on the south side, in depth 41 ft. 6 in., and in height 15 ft., be the said several dimensions, little more or less." Now what passed in respect of this gateway? It is said by Mr. *Hall* that a mere easement passed, an incorporeal hereditament, a right on the part of *Wimbush* to pass from *Oxford Street* into the yard and from the yard into *Oxford Street*, and nothing more. It is said, on the other hand, by Mr. *Warmington* that a corporeal interest passed, in point of fact that the property or ownership passed. In my opinion Mr. *Warmington's* contention is right. I think ownership passed. The exclusive use of the said gateway was given. The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted use of a piece of land. It is not an easement in such a case, it is property that passes. Again, a mere easement can be conveyed, or may be conveyed, by words other than these, and would pass under general words. But here

we have the words to which I have called attention. A mere easement or right of way, as a general rule, I venture to think, is not set out by measurements in the way that what passes here is set out by measurements.

But then it is said by Mr. *Hall* you have the word "gateway," and he relies on the word "gateway" as meaning a right of way and nothing more. Now, in my opinion, Mr. *Hall* is not entitled to rely on the word "gateway" to that extent. I think the word "gateway" is mere description of the thing, a mere mode of identifying the thing which has to pass, and it cannot in any way be construed as restrictive of the previous words "exclusive use." This case seems to me very much like the illustration I am about to give. *A.* is owner in fee simple of a certain set of chambers in the *Temple*, and he grants to an undertenant the exclusive use of one of the rooms in that set of chambers. I take it the ownership in that set of chambers passes, and the person who takes is entitled to use those chambers in a reasonable way, the walls of those chambers in a reasonable way, and the ceiling, if it were necessary to use it, in a reasonable way.

The conclusion in this case that I arrive at is this—that there was conveyed to *Wimbush* an absolute ownership in the passage subject to this, that he must use the passage reasonably, that he must not in any way interfere with the concurrent or the relative rights of his grantor, that he may use what I may call the floor of the passage, or the ceiling of the passage, or the walls of the passage, in every reasonable way; I need scarcely add, not in any way creating a nuisance, or in any way infringing upon the rights of the grantor.

For myself I entertained a very strong opinion somewhat early in the case that Mr. *Warmington's* contention was right; but there was one matter which caused me to pause and hesitate, and that was the plan. For some time I felt a difficulty in understanding why whilst the other parcels passing by the deed of 1839 were coloured pink this passage was not coloured pink, what passed being described in the deed by reference to a plan; but to my mind that has now been satisfactorily explained. I think the explanation is this. With regard to that portion of

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the property which is coloured pink, everything above and below was being conveyed; with regard to this part of the property, the passage, nothing below and nothing above was conveyed. I take it that is the reason why we find this diversity in the colouring.

I think, therefore, that the judgment of the learned Judge below was right, and that this appeal should be dismissed.

Warmington, Q.C., gave an undertaking on the part of the Defendant, that the position of the transparency should be altered as required by the Court.

Solicitors for Plaintiffs: *Janson, Cobb, Pearson & Co.*
Solicitors for Defendant: *Ranger, Burton, & Matthews.*

M. W.

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NORTH, J.
Jan. 25.
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Feb. 11.

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[1889 B. 5455.]

Railway Company—Scheme of Arrangement—Assent of Preference Shareholders—Shares divided into Preferred and Deferred Half Shares—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 6, 12 [*Revised Ed. Statutes, vol. xv., pp.* 599, 600].

A railway company were empowered by their Act to divide their ordinary shares into preferred and deferred half shares, and a large number of their shares were divided accordingly. There was no other power in the Act to issue preference shares. The company filed a scheme of arrangement with their creditors under sect. 6 of the *Railway Companies Act*, 1867, to which they obtained the assent of the debenture-holders, and also of the ordinary shareholders (including the holders of preferred and deferred half shares), at an extraordinary general meeting:—

Held, that the holders of preferred half shares did not form a class of preference shareholders whose separate assent must be obtained under sect. 12 of the Act.

THIS was a petition by directors of the *Brighton and Dyke Railway Company* for the confirmation by the Court of a scheme of arrangement between the company and their creditors, which had been filed under the provisions of the *Railway Companies Act*, 1867.

The company was incorporated by the *Brighton and Dyke*

Railway Act, 1877 (40 & 41 Vict. c. clxxxix), for the purpose of constructing certain railways.

The following provisions of the Act bore reference to the questions in dispute:—

Sect. 6 provided that the capital of the company should be £72,000 in 7200 shares of £10 each.

Sect. 10. "Subject to the provisions of this Act, the company, with the authority of three-fourths of the votes of the shareholders present, in person or by proxy, at a general meeting of the company specially convened for the purpose, may from time to time divide any share in their capital into half shares, of which one shall be called 'preferred half share' and the other shall be called 'deferred half share.'"

Sect. 11. "The dividend which would from time to time be payable on any divided share, if the same had continued an entire share, shall be applied in payment of dividends on the two half shares in manner following: (that is to say) first, in payment of dividend after such rate, not exceeding five per centum per annum, as shall be determined once for all at a general meeting of the company specially convened for the purpose, on the amount for the time being paid up on the preferred half share, and the remainder, if any, in payment of dividend on the deferred half share, and the company shall not pay any greater amount of dividend on the two half shares than would have from time to time been payable on the entire share if the same had not been divided."

Sect. 12. "Each preferred half share shall be entitled out of the profits of each year to the dividend which may have been attached to it by the company as aforesaid in priority to the deferred half shares bearing the same number; but, if in any year ending the 31st day of December there shall not be profits available for the payment of the full amount of dividend on any preferred half share for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company."

Sect. 13 provided for the registration of the half shares and the issuing of separate certificates for them, bearing respectively the same numbers as the entire shares.

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Sect. 17. "The several half shares under this Act shall be half shares in the capital of the company, and every two half shares (whether preferred or deferred, or one of each) held by the same person shall confer such right of voting at meetings of the company, and (subject to the provisions hereinbefore contained) shall confer and have all such other rights, qualifications, privileges, liabilities, and incidents as attach and are incident to an entire share."

Sects. 18 and 19 authorized the company to borrow money on mortgage, and to issue debentures to a certain amount. The company were not empowered to issue any guaranteed or preference shares otherwise than as before mentioned. The whole of the share and debenture capital had been issued.

In 1887 the following resolution was duly passed in accordance with sect. 10 of the Act:—

"That in accordance with and subject to the provisions of the company's Act of incorporation, the company may from time to time divide any share in the capital (with the consent of the holder for the time being of such share) into half shares, of which one shall be called 'deferred half share,' and the other shall be called 'preferred half share,' and that the dividend payable in respect of the amount for the time being paid up on the 'preferred half share' shall be 5 per cent. per annum."

About 5000 of the 7200 ordinary shares had been divided in pursuance of the above resolution into preferred half shares and deferred half shares.

The company had made an agreement with the *London and Brighton and South Coast Railway Company* for the working of their railway by the latter company.

An affidavit in support of the petition made by the chairman of the company stated as follows: The company had borrowed £24,000 upon the security of debenture stock to that amount, but the scheme did not prejudicially affect the rights or interests of the holders of that stock. No rent-charge or other payment had been charged by the company upon their receipts or was payable by them. At an extraordinary general meeting of the ordinary shareholders of the company, including the holders of preferred and deferred half shares, specially called for the purpose.

and held on the 23rd of December, 1889, the scheme of arrangement was submitted to the shareholders, and a resolution assenting to it was passed by a large majority of the shareholders then present. No separate assents had been obtained from the holders of the preferred half shares as a separate class.

The petition was heard before Mr. Justice *North* on the 25th of January, 1890.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the Petitioners:—

Before the scheme is considered on its merits the question arises, whether the holders of the preferred half shares constitute a class of "preference shareholders" within the meaning of sect. 12 of the *Railway Companies Act*, 1867, for, if they do, it is necessary that their assent to the scheme should be given in writing, and this has not been done. We submit that the holders of these preferred half shares are not preference shareholders. The only preference is of the preferred half over the deferred half, and every ordinary shareholder has a right to have his share split up into these two half shares.

[NORTH, J.:—Suppose that all the ordinary shares had been divided, and the preferred halves had all become by transfer vested in different persons from the holders of deferred halves, would there not then be a distinct class of preference shareholders? Can the position of the holders of preferred half shares as preference shareholders depend on the mere accident whether all, or only some of, the original shares are divided?]

After the shares are divided the dividend payable on the whole capital is ascertained just as if there had been no division of the shares, and then the whole dividend, up to 5 per cent., attributable to each divided share goes to the preferred half of it. This does not constitute the holders of the preferred halves preference shareholders. A preference shareholder is a person who takes some part of the fund available for dividend in priority to everyone else not in the same class with himself; he has an absolute preference as regards dividend. This does not apply to the holders of these preferred half shares—at any rate, not until all the shares have been divided.

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S. Stephens, for holders of preferred half shares.

J. T. Prior, for the *London, Brighton, and South Coast Railway Company.*

NORTH, J.:—

I think that the necessary assent to the scheme has not been obtained. I cannot act on the power given to me by sect. 17 of the Act of 1867 of confirming the scheme, unless I am satisfied that all the assents required by the Act have been obtained. The assent of the ordinary shareholders appears to have been properly obtained; but the assent of a certain class of shareholders has not been obtained. The question is, whether their assent is required by the Act. If the present mode of issuing the shares of a railway company had been the same as that which was in use at the time when the Act of 1867 was passed, no difficulty would have arisen. But a scheme has been since that time invented for splitting ordinary shares of a company into two parts, called preferred half shares and deferred half shares, and I have to deal with that state of things. [His Lordship read the above-stated sections of the special Act, and continued:—] Under these provisions a certain number of the ordinary shares of this company have been split into two. Of course the whole object of these provisions is to enable the holders of the ordinary shares to split them into two parts, and to deal with the two halves separately, by getting rid of either the one or the other. If the holders of the shares, after they had split them into two, retained both the halves, the provisions of sect. 10 of the special Act would be of no use at all. The object is to enable them to dispose of the two halves to different persons. If all the shares were divided into two it could hardly be disputed—and it was not, I think, really disputed—that there would be two classes of shareholders, one a class of preference shareholders, whose assent to the scheme must be given separately in the manner required by sect. 12 of the Act of 1867. But it is suggested that, because some only of the shares have been split into two, there is not any separate class of holders of preferred half shares as distinguished from the holders of deferred half shares. In my opinion there is,

because a certain number of persons have become holders of preferred half shares. The strongest way, I think, of putting the argument for the contrary view is this. Suppose a small proportion of the ordinary shareholders (less than one-fourth) objected to a proposed scheme, they could not successfully oppose it, and they must be overruled by the majority. But, if they were to split their shares into two parts, they could at once negative the acceptance of the scheme, because their assent would have to be obtained as a separate class, although otherwise their opposition would have been overruled by the majority. But that argument is not to my mind conclusive. It is admitted that, if all the shares had been divided, the holders of the preferred halves would have constituted a class of preference shareholders, and I cannot think that their rights depend upon the number of shares which have been divided. I cannot see any difference in principle between the transferee of a preferred half share and the holder of a share which was originally created as a preference share. I think they must be treated as standing in the same position. If the holder of a divided share had not transferred either half, I think he would be a preference shareholder as to the one moiety, and an ordinary or deferred shareholder as to the other. I can see no reason why he should, as regards the preferred moiety, be deprived of the right given by sect. 12 of the Act to preference shareholders, to have their assent to the scheme ascertained in the mode there pointed out. A difficulty no doubt arises by reason of this new division of shares having been invented since the Act of 1867 was passed. But I think the holders of the preferred half shares must be dealt with as a separate class. There may be a conflict of interest between them and the ordinary shareholders, and it is obvious that their rights may be affected by the scheme. I am of opinion that the holders of the preferred half shares will not be bound by the scheme, unless their assent is obtained in the manner prescribed by sect. 12. The petition must stand over for the purpose of obtaining their assent.

W. L. C.

C. A.

From this order the company appealed. The appeal was heard on the 11th of February, 1890.

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Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the Appellants:—

The company in the present case did not exercise the power of splitting their shares into "preferred" and "deferred" half shares under the provisions of the *Regulation of Railways Act*, 1868, s. 13, which only applies under certain circumstances, but under the 10th and following sections of their own Act, 40 & 41. Vict. c. clxxxix. (1). We contend that the two sets of shares are not separate classes of shares, but only divisions of ordinary shares. In the general Act of 1868 the preferred half shares are called throughout "preferred ordinary stock"; the intention of the Legislature in the private Act is equally clear, although the language is not identical. The definition of a preference shareholder is one who is entitled to a dividend in priority to an ordinary shareholder: 26 & 27 Vict. c. 118, s. 14. That cannot apply to the holders of preferred half shares here. The two halves of each share still keep their old numbers on the register, and two of them can never be amalgamated into one share.

S. Stephens, for the holders of preferred half shares:—

The owners of preferred half shares are preference shareholders to all intents and purposes. By sect. 17 of the *Brighton and Dyke Railway Act*, there are made half shares in the capital of the company, and the holder of two of them is to have a vote and all other privileges of the holder of an entire share. It is difficult to see how a separate class can be created if not by these words. The holders of preferred half shares may have a different interest to the holders of deferred half shares, and it would be unjust not to require a separate assent from them.

J. T. Prior, for the *London, Brighton, and South Coast Railway Company*.

Cozens-Hardy, in reply.

COTTON, L.J.:—

I should hardly like to say what my opinion would be in a case where all the shares in a company like this had been divided into

(1) See the sections set out above.

preferred and deferred shares. I will not say whether the result would or would not be that the former were preference shares in the ordinary acceptation of the term; but I think there is not here at present a class of preference shares within the meaning of sect. 12 of the Act of 1867. Of course, this matter was not pointed at in the Act of 1867, because split shares like these were not then in existence or authorized by law, as far as I know. But in consequence of that power having been introduced into the Act of this railway company we are called upon to determine whether the shares which have been so split form a class of preference shares within the meaning of the Act of 1867. I am afraid I do not entertain so clear an opinion as my learned brethren do, but I think these are not preference shares. We have not the same nomenclature in the Act of 1877, under which this company was formed. It does not in terms speak of part of the split shares as preferred ordinary stock and the other part as deferred ordinary stock; but I think in substance we cannot say there is any class of preference shares here, for this reason, that in the Act of 1877 there is nothing mentioned but ordinary shares—there is no statement that there are to be any preference shares or stock at all; and on looking at the Act I see this, that when two of the shares which are split come together they never become, as far as I can see, one entire share, although the Act does give to anyone who holds two split or half shares, whether they be deferred or preferred, the same right of voting as if he held an entire share. But that is entirely different from saying that the shares, when there are two united together of whatever class they may be, become one entire share. That to my mind creates a difficulty in the way of the view taken by Mr. Justice *North*; because how can it be said there was any class of preference shares when there are no preferred shares, but only these two halves, which when they come together give the same right of voting that they would have done if they had been one entire share?

We have a difficulty thrown upon us in this way, that when these classes of split shares were introduced those who framed the Act had not their attention called to the question arising here, and made no provision whether these two halves were to be considered as preference shares or not. I do not think we can

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hold them to be so, because preference shares are thus defined by sect. 14 of the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118): "The preference shares or preference stock so issued shall be entitled to the preferential dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares and ordinary stock of the company." That is not what is done here. The dividend attributable to the ordinary stock is to be given to these shares which have been split, but then with respect to that dividend, one half of the split share is to have a fixed dividend given to it, and the remainder of the dividend is to go to the deferred half of the split share. One sees, notwithstanding the arguments which have been used, that there may very likely be differences of interest as between those who hold the preferred halves and those who hold the deferred halves, which might make it very reasonable, if the Judge thinks it right to say so when he considers the scheme, that there shall be some assent obtained from those who hold the preferred half shares, but I cannot see that Parliament here, by sect. 12 of the *Railway Companies Act*, 1867, has touched these half shares or their holders as either preference shares or a class of preference shareholders. I think we have in this case, as in many others, to deal with this matter as something which ought to have been provided for and has not been provided for, and what we have to do is to see how best we can fit in a new state of things to legislation which was passed without any reference to that state of things.

I differ from the view which was taken by the learned Judge that this is required by sect. 12, but I express no opinion as to what had better be done if he sees there is any difference of interest between the holders of the preferred and the deferred half shares.

LINDLEY, L.J.:—

Mr. Justice *North* has ordered a petition to confirm this scheme to stand over on the theory that this company contains a class of persons who are preference shareholders within the meaning of sect. 12 of the *Railway Companies Act*, 1867, and that the requisite assents of that class of shareholders to this scheme have not been obtained. There is no doubt from the form of the order, as

drawn up, that that was his view, and we have to consider whether it is right.

I have come to the conclusion that this company has no class of shareholders who are preference shareholders within the true construction of sect. 12 of the Act of 1867; and that, therefore, there is no necessity for convening a meeting such as is referred to in that section, or for obtaining the assents which would be necessary if there were a class of preference shareholders. It is quite obvious that the confusion which has arisen in this case arises from a practice which has originated since 1867. So far as I know, the method, which is now not very uncommon, of dividing stocks or shares into two halves was unknown in 1867. When we come to look at the rights of the holders of the various halves, although unquestionably there is a preference to a certain extent between the holders of the preferred halves over the holders of the deferred halves, the holders of the preferred halves are not what is commonly called preference shareholders, and are not within the class of people denoted by that expression in the Act of 1867.

Under these circumstances, it appears to me that Mr. Justice *North* has erred in the construction which he has put upon the *Railway Companies Act*, 1867. When the case comes before him he will have to deal with it as prescribed by sect. 17, and of course these holders of the preferred half shares will be entitled to be heard in opposition to that scheme, and it will be the duty of the Judge to see that they are not unfairly dealt with and that their rights are sufficiently protected; and of course he can if he thinks it right, decline to confirm the scheme unless they assent. That is within his power under sect. 17. They are protected by the duty cast upon him by that section; but the particular method of protecting them which has been adopted appears to me not to be warranted by the Act.

I think, therefore, the appeal must be allowed, and the case remitted to the learned Judge to be dealt with upon its merits.

LOPES, L.J.:—

In this company there were no preference shares—they were all ordinary shares; but these ordinary shares had been split into

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preferred and deferred shares. What I understand to be the definition of a preference share is this—a right conferred upon the holder to receive interest in priority to the ordinary shareholders. I cannot think that the holders of these split shares are in that position, and I am of opinion that this case does not come within the terms of sect. 12 of the Act of 1867. I have no doubt that in 1867 this plan of splitting the shares into preferred and deferred shares had not been devised, and that the Act of 1867 was passed without any reference to the state of things which has happened in regard to this company. I think this appeal should be allowed.

Solicitors: *Powell & Rogers; F. J. Blake; Norton, Rose & Co.*

M. W.

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Dec. 12;
1890
Jan. 18, 21, 22, 29.
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Feb. 7, 8, 10, 12.

In re EAST AND WEST INDIA DOCK COMPANY.

Railway Company—Scheme of Arrangement—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127) [*Revised Ed. Statutes, vol. xv., p.* 598]—*Outside Creditors.*

A railway company which was unable to meet its engagements, and was heavily indebted to debenture-holders to whom a large arrear of interest was due, and who to a great extent could call for immediate payment of the principal, filed a scheme of arrangement which provided that the arrears of interest on debentures should not be paid, but be funded and carry interest—that the debenture-holders should not call for payment of principal for ten years—that if within that time any specifically mortgaged property should be realized, one-half of the surplus proceeds should be applied in redemption of deferred debenture stock created under the scheme, and the other half carried to the secured interest reserved fund—that the income of the company should be applied in payment of interest on debentures, debenture stock, and funded interest, and subject thereto in payment of interest on deferred debenture-stock—that all available funds on a certain day and outstanding items then due to the company should be carried to the secured interest reserved fund, and that such fund should be applicable to payment of interest on debentures and debenture-stock (except deferred debenture stock), and interest on funded interest (except funded interest on deferred debenture stock), and that the company should have power to liquidate debts to unsecured creditors by the issue of deferred debenture stock at par, which was to be subject to the prior debentures and debenture stock. A large unsecured creditor opposed the confirmation of this scheme on the ground that it appropriated all the free

assets of the company to which an unsecured creditor could have recourse, and that it gave the company power to prefer some creditors to others, as it did not bind the company to issue deferred debenture stock to all unsecured creditors who applied for it.

Held, (affirming the decision of *Chitty*, J.) that the scheme appeared to be honestly framed with a view to the benefit of all parties, and that no sufficient objection was shewn to its confirmation, as it did not purport to bind outside creditors, and its appropriation of the free assets could not be complained of by outside creditors who had no lien on them, and it was to be presumed that the company would exercise honestly and fairly the power of issuing deferred debenture stock to unsecured creditors.

THE *East and West India Dock Company* was a company formed by Act of Parliament for the purpose of making a dock, but was subsequently authorized by Act of Parliament to make a railway. In 1888, the company being in difficulties, a debenture-holder who had obtained judgment against the company applied for the appointment of a receiver and manager under sect. 4 of the *Railway Companies Act*, 1867. On the 12th of March, 1888, Mr. Justice *Chitty* granted the application, and his order was affirmed by the Court of Appeal on the 9th of May, the Court holding that the company was a railway company within the meaning of the Act. (1) The same creditor afterwards, in an action on behalf of himself and the other debenture holders, obtained the appointment of a receiver and manager not only of the undertaking but of all the property of the dock company.

On the 29th of May, 1889, the company filed under the Act a scheme of arrangement with its creditors. Its ordinary stock was of the nominal amount of £2,385,500 or upwards. Its mortgages, charges, and debenture stock amounted to more than £3,000,000, upon which about one and a half year's interest was owing. At the time when the scheme came before the Court for confirmation, about £300,000 of the principal money secured by mortgages and charges was overdue, and judgment had been recovered for parts of it. On the 1st of July, 1890, upwards of £326,000 more would fall due. Some of the principal *London* banks claimed to be creditors for sums amounting to £584,900 principal, £37,067 interest to June, 1889, and £20,000 subsequent interest. *Truman, Hanbury & Company* were unsecured credi-

(1) 38 Ch. D. 576.

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tors for upwards of £40,000. Messrs. *Lucas & Aird* were judgment creditors of the company for about £62,000, for which they held no security. The *London, Tilbury and Southend Railway Company* were creditors for a sum which had not been ascertained, but was estimated at about £6000. Messrs. *Kirk & Randall*, contractors, had a claim for more than £600,000, which was being disputed. There were other outside creditors to an amount not exceeding £50,000 in the whole.

The scheme was assented to by the requisite majorities of the stockholders and the holders of mortgages, charges, and debenture stock. The *London* banks also assented to it, and Messrs. *Truman, Hanbury & Company* agreed, in the event of the scheme being confirmed, to accept in satisfaction of their debt deferred debenture stock provided for by the scheme. On a petition being presented for confirmation of the scheme, Messrs. *Lucas & Aird*, the *Tilbury Company*, and Messrs. *Kirk & Randall* appeared in opposition to it.

The provisions of the scheme were as follows:—Clause 1 provided for the times at which interest on mortgages, charges, and debenture stock should become due. Clause 2 provided that no interest on the mortgages, charges, and debenture stock of the company accruing between the 31st of December, 1887, and the 1st of July, 1889, should be paid, but should be treated as funded interest, bearing interest from the 1st of July, 1889, at the same rate as the principal and as secured on the same security as the principal; clause 3, that if at any time during the ten years after the 1st of July, 1889, the realized profits of the company, together with the money (if any) for the time being to the credit of the secured interest reserve fund, should not suffice to pay the whole of such the accruing interest for any half-year in cash, then and in any such case the company should fund the interest for such half-year, provided that such funding under this clause should not be effected for more than four half-years altogether—these four half-years to be taken either consecutively or separately; clause 4, that if and so long as the interest on any mortgage or charge of the company, including interest on funded interest, should be duly satisfied by funding, as provided for by the scheme, or

should be paid on the date on which it was payable, or within twenty-one days afterwards, the principal of such mortgage or charge, although the same might have fallen due after the 31st day of December, 1887, should not be called in until the expiration of ten years after the date on which but for the scheme it might have been called in—provided that if at any time during such period of ten years any property charged or mortgaged specifically, and not merely as part of the general assets and undertaking of the company, should be realized, the proceeds of such realization should be applied in or towards redemption of such charge or mortgage, and subject thereto one-half of such proceeds should be applied to the purchase or redemption at or below par of deferred debenture stock of the company, and the other half should be carried to the credit of the secured interest reserve fund; clause 5, that the income of the company should be applied in providing for working expenses and other outgoings in respect of the undertaking and of certain costs, and for the payment from the 1st of July, 1889, of the interest on the mortgages, charges, debenture stock, and funded interest, and subject thereto for the payment of interest on deferred debenture stock and on the funded interest thereon; clause 6, that all available funds in hand on the 30th of June, 1889, and all outstanding items due to the company on the same date, and the balance of income in any half-year in which interest was funded under the scheme, should be carried to a reserve fund to be called "the secured interest reserve fund," and such fund should be applicable exclusively during the ten years from the 1st of July, 1889, to payment of interest on the mortgages, charges, and debenture stock (exclusive of the deferred debenture stock of the company), and interest upon funded interest, exclusive of funded interest upon deferred debenture stock; and clause 7, "the company shall have power to liquidate debts and liabilities to unsecured creditors incurred before the 5th of March, 1888, by the issue of deferred debenture stock at par, bearing interest at the rate of 4 per cent. per annum charged on the undertaking of the company, subject to the prior mortgages, charges, and debenture stock secured thereon, including funded interest thereon under this scheme. No interest is to be paid in any half-year on the

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deferred debenture stock except so far as the profits of the company for that half-year shall be sufficient to pay the same after providing for the interest on the mortgages, charges, and debenture stock and funded interest thereon. Provided that any surplus profits in any half-year, after paying interest on the mortgages, charges, debenture stock, and funded interest thereon, and on deferred debenture stock and funded interest thereon, shall be devoted to payment of arrears of interest on deferred debenture stock before being available for dividend on the capital stock of the company. Provided also that in every half-year in which interest on mortgages, charges, and debenture stock is funded, the interest for that half-year on deferred debenture stock shall be funded also, and shall bear interest at the same rate, and secured on the same security as the deferred debenture stock." Clause 8, that nothing therein contained should prevent the payment of a dividend to the proprietors out of any money properly applicable thereto.

The petition came on for hearing before Mr. Justice *Chitty*, on the 12th of December, 1889.

Latham, Q.C., and *Howard Wright*, appeared for the company.

Whitehorne, Q.C., and *J. T. Prior*, *Moulton*, Q.C., *Byrne*, Q.C., and *Farwell* appeared for Messrs. *Lucas & Aird*, Messrs. *Kirk & Randall*, and the *London, Tilbury, and Southend Railway Company*, the unsecured creditors opposing.

Dunning appeared for various banks assenting.

1890. Jan. 29. CHITTY, J.:—

I am satisfied that this scheme has been duly assented to as required by the Act. There was no contest on this point except as to the claim of the *Tilbury Company*, which I have already disposed of. The total amount of the statutory loan capital falling under the 10th section of the Act—viz., mortgages, bonds, and debenture stock issued by the company—exceeds £3,000,000. The holders of this loan capital have duly assented by the statutory majority. The total amount of the company's ordinary

stock falling under the 13th section is £2,385,500 or upwards. The holders of this stock have also duly assented. The company has issued no preference stock. Besides these assents, which are required by the Act, assents have been given by persons whose assents are not required by the Act. Some of the principal *London* banks are or claim to be creditors of the company. They have all assented to the scheme. Subject to a question affecting the validity of their claim, they are creditors for £584,900 principal, and for £37,067 interest due to the 30th of June, 1889, making together £621,987, and for subsequent interest amounting to about £24,000. They claim to hold as security the moneys to arise from the sale of certain warehouses of the company, and also £229,900 of the loan capital; they also claim to be entitled to have issued to them £300,000 preference stock. Messrs. *Truman, Hanbury, & Co.*, unsecured creditors for upwards of £40,000, have agreed, in the event of the scheme being confirmed, to accept in satisfaction of their debt deferred debenture stock intended to be created and issued under the scheme.

The scheme having been thus assented to, the question remaining for decision is whether, in the language of the 17th section of the Act of 1867, the Court is satisfied that no sufficient objection to the scheme has been established. If so satisfied, the Court has jurisdiction to confirm the scheme, which, when confirmed and enrolled, will, against and in favour of the company and all parties assenting thereto or bound thereby, have the like effect as if it had been enacted by Parliament. The only opposition to the confirmation of the scheme proceeds from outside creditors. None of the opponents hold any security. The opponents are, first, Messrs. *Lucas & Aird*, judgment creditors for about £62,000; and, secondly, the *Tilbury Company*, creditors for a sum not yet ascertained, but which may be taken to be about £6,000. The other opponents are Messrs. *Kirk & Randall*, whose claim exceeds £600,000. They have no judgment for any part of their claim, which is still being disputed. They have obtained an award in their favour in respect of part of their claim, but this is under appeal to the House of Lords. Excluding the debt of Messrs. *Truman, Hanbury, & Co.*, and excluding also the claim of the banks, the total amount owing by the company

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to other outside creditors up to March, 1888, does not exceed £50,000.

The position of outside creditors in reference to a scheme under the Act has been judicially ascertained by a series of reported cases and decisions ranging from *In re Cambrian Railways Company's Scheme* (1), before Lord *Cairns*, 1868, to *Stevens* v. *Mid-Hants Railway Company* (2), before the Court of Appeal in 1873. In the first of these cases the question arose on a motion to stay proceedings under the seventh section pending the time allowed for the maturing of the scheme. In the last it was raised after the scheme had been sanctioned. In the intermediate cases it arose on the petition to confirm the scheme. By these authorities it is established that outside creditors who do not assent to the scheme are not bound by it. In his judgment, in *Stevens* v. *Mid-Hants Railway Company*, Lord Justice *James* thus stated the law (3):—

"It has been established that, according to the true construction of the Act of Parliament, an outside creditor is in no way bound by the scheme. If he is not in any way bound by the scheme, he ought not to be entitled to any benefit from that scheme. He is in the position of a person who, according to my view, is not entitled to read the scheme at all for any purpose. He says, 'I have nothing to do with the scheme.' If he has nothing to do with the scheme, he cannot claim a benefit from it. He is entitled to say, 'I shall insist upon my rights as if no such scheme had been made.' His utmost right, if no such scheme had been made, would have been to have said, 'When the mortgagees prior to me have been satisfied, I have a right to be satisfied.' And he has now no other right unless it is given him by the scheme."

The Lord Justice was dealing with the case of an outside creditor who was claiming a right under a scheme by which he was not bound. I have quoted this passage in its entirety because it shews clearly the opinion of the Lord Justice as to the position of such an outside creditor in reference to a scheme which had been previously confirmed by the Court. The Lord

(1) Law Rep. 3 Ch. 278. (2) Law Rep. 8 Ch. 1064.
(3) Law Rep. 8 Ch. 1069.

Justice *Mellish* concurred in this judgment. The strict logical deduction from the proposition that an outside creditor is not bound by the scheme might have been that the Court would not hear an outside creditor appearing to oppose the scheme on the petition to confirm. But this is not so. Under the enactment in the 17th section, as to hearing "creditors whom the Court thinks entitled to be heard," the Court has on several occasions in the exercise of its discretion allowed an outside creditor to be heard in opposition to the scheme. And accordingly, in the circumstances of the case, I thought it right to permit the present opposing creditors to be heard. Further, the Court has not merely permitted the outside creditors to be heard, but has in certain cases given effect to their objections by declining to sanction the scheme. On this point I refer to two reported decisions—viz., *In re Bristol and North Somerset Railway Company* (1), decided by Lord Justice *Giffard* when Vice-Chancellor in 1868, and *Re Somerset and Dorset Railway Company* (2), decided by Vice-Chancellor *Stuart* in 1869. In the first of these cases Vice-Chancellor *Giffard* had before him a scheme which in terms purported to bind outside creditors to accept shares in discharge of their debts and to release their debts and all securities for them. The Vice-Chancellor, though he held that the outside creditors would not be bound, declined to confirm the scheme which thus attempted to bind them. In the second case Vice-Chancellor *Stuart* was asked to confirm a scheme which, as he considered, purported to deprive a landowner of his rights. The landowner had obtained a decree establishing his lien on land which the company had taken from him, and his right to resume possession in the event, which had happened, of his purchase-money not being paid. The clause apparently objected to was one which required the company to dispose of their superfluous land as it became saleable and to pay the proceeds to the directors who had made advances to the company. The Vice-Chancellor, acceding to the objection of the landowner, declined to confirm the scheme. The scheme also contained a clause purporting to deal with moneys in the hands of a receiver appointed in a suit and claimed by the *Bristol Railway Company* under a pending

(1) Law Rep. 6 Eq. 448. (2) 18 W. R. 332.

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summons. The scheme purported to deal with those moneys in a manner which, if binding, would have deprived the *Bristol Company* of their claim by appropriating the money to certain costs and treating the balance as revenue of the *Somerset Company*, on whose behalf the scheme had been filed. The scheme thus purported to sweep away from the outside creditors all the free assets of the company. The Vice-Chancellor, while declining to decide the question of the validity of the *Bristol Company's* claim, also held their objection, founded on this claim, to be sufficient. According to the report of his judgment, the Vice-Chancellor proceeded on the ground that the opposition was reasonable, as the opposing parties' rights would be prejudiced by the scheme. Before the order was drawn up the case was again mentioned, and I have ascertained, from inspection of the order, that the opposition of the landowner and the *Bristol Company* was afterwards withdrawn, and that an order was made confirming the scheme, although some of the parties did not assent. In connexion with this part of the subject there is another authority to which reference should be made. It is the case of *In re East and West Junction Railway Company* (1), before Lord Justice *James* when Vice-Chancellor in 1869. In regard to the opposition of an outside creditor the Vice-Chancellor stated (2) his opinion that outside creditors were not bound by the scheme, that it did not bind them at all, and that the opposing creditor was not in the slightest degree prejudiced. In his judgment confirming the scheme he stated (3) that if he thought that the scheme deprived any creditor of any reasonable prospect of being paid he should have had much more hesitation in confirming it, but that he could not help seeing that unless some scheme was resorted to there was nothing for the company and nothing for the creditors. The scheme before him purported to empower the company to raise at a discount a large amount of money by means of a new debenture stock, to be called the first debenture stock, and to rank as a first charge on the undertaking. It must be borne in mind that an ordinary creditor obtaining a judgment can acquire an interest in the surplus profits of the

(1) Law Rep. 8 Eq. 87. (2) Law Rep. 8 Eq. 91.
(3) Law Rep. 8 Eq. 93.

undertaking through the medium of the appointment of a receiver by virtue of the 4th section of the Act. In point of mere abstract right this power to create a new debt affecting the undertaking in priority to all other debts might be said to prejudice the position of an outside creditor. The Vice-Chancellor, however, did not regard the question as one of abstract right, but a question of due exercise of a judicial discretion.

The result at which I have arrived is this. The Legislature has committed to the Court a large discretionary power of a legislative character, to grant or withhold its sanction to a scheme. The Act itself affords little or no assistance on the question of what is a sufficient objection; it leaves the question to the decision of the Court, which, it is to be presumed, will exercise its discretion according to ordinary judicial principles. Where a judicial discretion is thus conferred there is a risk of overlaying the discretion by prior decisions, until at last for practical purposes the discretion ceases to exist. The decisions to which I have referred are, as I apprehend, not absolutely binding on me, but they are useful guides in exercising the discretion in similar cases. No absolute rule applicable to all cases can be extracted from the authorities, or, in my opinion, ought to be laid down, unless perhaps it is this—viz., that where a scheme on the face of it purports directly to take away the substantial rights of non-assenting outside creditors, for instance, as by converting them from creditors into mere shareholders, the Court will at their instance decline to sanction the scheme, notwithstanding that in regard to them it is a nullity.

I now proceed to deal with the specific objections raised in the order which appears to me to be most convenient. It is urged against the seventh clause of the scheme that the company purport to take power to force their unsecured creditors to accept the deferred debenture stock in satisfaction of their debts. This contention turns on the true meaning of the clause. It certainly does not in express terms purport to compel the creditors to take the stock. It is wholly different from the two clauses relied on in *In re Bristol and North Somerset Railway Company* (1). In construing a scheme regard must be had to the

(1) Law Rep. 6 Eq. 448.

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principle that the outside creditors are not bound, and it would be a wrong method of interpretation to hold that the company are seeking to do that which cannot be done. Plain and distinct words should be required. In my opinion the clause is not open to any reasonable doubt. It says nothing about the creditors being bound to take stock; it does not even say that the stock is to be issued to the creditors. Consistently with the clause the stock might be issued to any person willing to advance money in exchange for the stock to form a fund for payment of the creditors. The objection cannot be maintained. If the other objections are overruled, it will be competent for me, following the authority of Vice-Chancellor *James* in the case of *In re East and West Junction Railway Company* (1), to preface the order with a declaration as to the true meaning of the clause. I should decline to insert such a declaration where the clause was fairly open to two meanings and the clause affected the rights of the assenting parties, whose assents might have been given on the footing of the meaning not being that which the Court declares. This clause, however, does not affect in any manner the persons assenting.

An objection is raised to the provision in the fourth clause on the ground that it deals, or purports to deal, with the surplus land of the company. Mr. *Moulton* alone put forward this extreme proposition—that in no circumstances ought the Court to sanction a scheme which purports to deal with surplus lands or free assets of the company unless all the outside creditors consent, or, at all events, not if any outside creditor objects. No authority has gone this length, and the proposition cannot be maintained. In *Re Somerset and Dorset Railway Company* (2) the scheme was confirmed, although all parties did not assent. It was further objected to the provision in the fourth clause that it deals, or purports to deal, with the surplus lands and free assets of the company in a manner unfair to the outside creditors, and that it would sweep away the principal or only fund to which they can have recourse for payment. Now, whether the scheme is sanctioned or not, the outside creditors will be free to pursue all their remedies, whatever they may be, against any such lands

(1) Law Rep. 8 Eq. 87. (2) 18 W. R. 332.

and assets. And, so far as they can effectually reach them or make them available for payment of the debts, they will be at liberty so to do, notwithstanding that they may thereby impair the working of this part of the scheme. The only power to stay execution or other process against the property of the company is under the 9th section of the Act of 1867, whilst the scheme is maturing. That power comes to an end so soon as the scheme is passed or rejected.

In regard to the objections now under consideration, it will be convenient here to state some further facts bearing on the position of the outside creditors and the financial position of the company. Under the 4th section of the *Railway Companies Act* of 1867 a judgment creditor obtained in March, 1888, the appointment of receivers and managers of the undertaking, subject to certain modifications rendered necessary by the subsequent special Act of 1888. The order of March, 1888, is still subsisting, and the inquiries and other proceedings under it are still pending. Under the Act of 1888 the undertakings of this company and the *London and St. Katharine Docks Company* are now being managed as one undertaking by an incorporated joint committee, who account to the receivers under the order of March, 1888, for the statutory proportion (thirty-one hundredths) of the surplus profits arising from the undertakings under their management. This share of profits, when in the hands of the receivers, forms part of the ordinary profits of the *East and West India Dock Company's* undertaking. All the profits of this undertaking from time to time in the hands of these receivers, after payment of working expenses and other proper outgoings in respect of the undertaking, are applicable to the payment of the company's debts, according to the rights and priorities of the persons for the time being interested therein, and under the 4th and 23rd sections of the Act of 1867 the holders of the authorized loan capital of the company have priority over the judgment and other outside creditors in respect of moneys coming to the hands of the receivers under the 4th section (see *In re Hull, Barnsley and West Riding Junction Railway Company* (1). There is also at present subsisting another receivership order made in an action.

(1) 40 Ch. D. 119.

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The judgment debt of the Petitioner who obtained the order of March, 1888, was in respect of an overdue debenture; and this same creditor, being in a position to issue execution on his judgment, instituted an action on behalf of himself and all others debenture-holders of the same class, to obtain payment. It was in this action that the last-mentioned receivership order was made. It extended to the undertaking and property included in the Plaintiff's debentures, and also to the company's property generally. It was ancillary and subordinate to the receivership under the 4th section. As the order stands it includes whatever surplus lands and free assets the company may be entitled to. I have already stated the amount approximately of the unsecured debts of the company and of the unsecured claims against the company. These debts amount to about £158,000. In this sum I include Messrs. *Truman & Co.'s* debt of £40,000. So far as appears, Messrs. *Lucas & Aird's* debt is the only judgment debt obtained by an outside creditor. As to Messrs. *Kirk & Randall's* disputed claim of upwards of £600,000, I can say no more than that it is a claim which may ripen, as to the whole or some part, into a debt. The company say that they have, in any view of the case, a considerable set-off. On this I pronounce no opinion. Nor can I pronounce any decisive opinion on the claim of the banks, amounting now to about £650,000. The company were not desirous of disputing the banks' claims, but were driven to raise the question of *ultra vires* by the course of action pursued by other creditors under the inquiry in the order of March, 1888, as to debts and priorities. Of the statutory loan capital (amounting, as I have said, to upwards of £3,000,000) there is now owing for overdue principal upwards of £300,000, and there will fall due for principal on the 1st of July, 1890, a further sum of upwards of £326,000. On the statutory loan capital two years' arrears of interest, amounting apparently to above £240,000, are now overdue. I should say that throughout this judgment I state amounts in round numbers and approximately. Judgment has been recovered for £50,000, part of the overdue £300,000, and immediate judgments could be recovered for the balance and for the £240,000, subject to any question as to the part held by the banks, and after the 1st of July further judgments could at once be obtained for the

£326,000. Upon the facts before me the company appear to have no surplus or superfluous lands in the ordinary acceptation of the terms. The surplus lands so-called of the company arise in this way. The company have power under their statutes to sell and dispose of any hereditaments which may be found by them to be unnecessary for the purposes of their Acts. They are not bound to exercise these powers. In, or with a view to, the exercise of these powers, the company, in 1887, placed certain warehouses in the hands of a firm of auctioneers as their agents with a view to a sale in case sufficient prices should be offered. The warehouses are the *Billiter Street* warehouses, the *Fenchurch Street* warehouses, the *Jewry Street* warehouses, and the *Crutched Friars* warehouses. The proceeds of sale for all these warehouses, except the *Crutched Friars* warehouses, are included in the securities held by the banks. The *Billiter Street* warehouses alone have been sold, and the purchase-money, amounting to £105,000, has been paid, and is now in Court. The *Crutched Friars* warehouses, by virtue of the special Act of 1888, now form part of the company's undertaking, placed under the management of the joint committee, and in that sense have passed to the joint committee. The *Fenchurch Street* warehouses and *Jewry Street* warehouses have not been sold. They were valued at £825,000 in 1879, more than ten years ago, but such prices have not hitherto been found to be obtainable. Now, upon the evidence before me, the only property of any substantial value which would fall within the provision in the 4th clause are the proceeds of sale of the *Billiter Street* warehouses and the proceeds of any sales of the *Fenchurch Street* and *Jewry Street* warehouses that may be made during the period of ten years. The mortgages and charges referred to are those held by the bankers. The clause will not have the effect of establishing those mortgages and charges; their validity or invalidity is left to be ascertained in the litigation which is proceeding. If these securities are upheld, the banks will take the amount of their debts out of the proceeds of the sale. This will leave a surplus, the amount of which cannot now be stated, but which probably will be considerable, and the surplus will be applicable for division into two parts under the provision if the scheme is confirmed. Without intending in any

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way to prejudice any question as to the banks' securities, I may go so far as to say that the banks appear, from what I have seen in the course of the proceedings under the 4th section of the Act, to have at least a *primâ facie* case. But supposing their securities are held invalid, then under the provision the whole of the proceeds of sale of the *Billiter Street* warehouses and the proceeds of the sale, if effected, of the other two warehouses will be applicable under the provision if the scheme is confirmed. But if the scheme is not confirmed it is by no means clear, and cannot be assumed, that the *Fenchurch Street* and *Jewry Street* warehouses could be reached through judgments or otherwise by the unsecured creditors. For it would, to say the least, be open to the statutory loan creditors to contend that those two warehouses, unless and until sold, or contracted to be sold, continue to be a part of the undertaking of the company over which their debts have priority, and they and the company might fairly contend that, by merely attempting to create invalid mortgages or charges in favour of the banks, the company had not done any act which would finally preclude them from saying that they were not bound to proceed to a sale. No such contention could, on the other hand, be raised by the statutory loan creditors or the company if the scheme is confirmed and the banks' claim established, inasmuch as they will be bound by it. But if the scheme is passed, the non-assenting outside creditors will still be at liberty to pursue any rights and remedies they may have against all three of the warehouses, or the proceeds of sale thereof, unless they choose to come in under the scheme by accepting the deferred debenture stock. This part of the scheme, taken in connection with the provisions under which the statutory loan creditors and the banks are precluded from calling in their debts during the conditional suspense period of ten years, appears to me in the circumstances of the case to be a fair offer of terms to the unsecured outside creditors. For the provision is that one-half of the proceeds, or of the surplus proceeds, as the case may be, shall be appropriated for the benefit of the deferred debenture stock, and the other half will go to the secured interest reserve fund. As part of the objections now under consideration, it was urged that if the scheme is passed the half appropriated to the

reserve fund might be applied according to the scheme before the unsecured creditors could reach it. This contention was founded (as are many of the opponents' objections) on the assumption that the outside creditors would be bound by the scheme, and it ignored the plain right of the company if not bound by the scheme to apply in payment of any of their debts in any order they may think fit such parts of their property not constituting their undertaking as are not for the time being affected or bound by any executions or other legal or equitable proceedings. If the scheme is passed the non-assenting creditors will be in a position to get at the money constituting the reserve fund by any lawful means open to them before the fund is actually paid away or applied; and so long as part of the reserve fund may for the time being remain unapplied it will continue open to any remedies which such creditor may be entitled to pursue in order to reach it. The creation of the reserve fund is rather to the advantage than the disadvantage of such creditors.

The two following further objections were raised to the 7th and 4th clauses of the scheme. First, it was said that, under the 7th clause, the company would not be bound to offer the deferred debenture stock to the outside creditor. To meet this the company offered at the bar to bind themselves by an undertaking to offer the stock to the opposing creditors, and all other the unsecured outside creditors. This undertaking was refused by the opposing creditors. Such an undertaking would not have been an amendment of the scheme, but would merely have amounted to an obligation as to the manner in which the company would exercise a power under the scheme, and would be binding on the company just as any contract to the like effect would be if entered into subsequently to the passing of the scheme. Secondly, it was said that the company would, in regard to the moiety appropriated by the 4th clause to the purchase or redemption of the deferred debenture stock, be at liberty to apply such moiety in the purchase or redemption of any part of such stock held by any particular holder whom they might desire to favour or prefer—to pick and choose at their pleasure. But, assuming this to be so, the company cannot pay any creditor more than the just amount of his debt, for under the 7th clause they cannot issue the

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deferred stock except at par, and under the 4th clause they cannot purchase or redeem any deferred stock except at or below par. Any outside creditor who may take the stock can read the scheme and ascertain for himself the terms on which he and others will hold the stock; and if he does not take the stock, it will be open to him to pursue whatever remedies he may have against the purchase or redemption fund or the money proposed to be appropriated to that fund.

Objections are also made to the capitalisation of interest under the 2nd and 3rd clauses on the ground of the provisions being unfair. These clauses must be read in connection with the 4th. The capitalisation proposed is, first, of overdue interest, and, secondly, of interest during the conditional suspense period of ten years. The overdue interest to be capitalised is the interest in arrear from the 31st of December, 1887, to the 1st of July, 1889. This amounts to £201,000, of which about £180,000 is due to the statutory loan creditors and the balance to the banks. There is available at present for the payment of this overdue interest a sum of £186,000 only, the greater part of which is in Court or in the hands of the receivers. The whole of this sum of £186,000 represents profits of the undertaking which could not be reached by the outside creditors. I exclude from the sum available the £105,000 representing the proceeds of the sale of *Billiter Street* warehouses, because the rights to that sum have not been ascertained. Instead of at once sweeping away this asset of £186,000 for the overdue interest, the secured creditors are content to be bound not to call in the overdue interest during the continuance of the ten years and to take interest on the £201,000 interest in arrear. The annual charge for interest on the £201,000 amounts to £8040 a year. Further, if the interest due and to fall due on and after the 30th of June, 1889, shall not be paid for any of four half-years during the continuance of the term, the secured creditors are content not to call in this interest, but to allow it to be capitalised, carrying the same interest as the debt carries. Four half-years' interest on the statutory loans amounts to about £240,000, and to about £50,000 to the other secured creditors. Besides this, during the continuance of the suspense period, the

secured creditors consent not to call in the principal (which, as I have said, will amount to upwards of £635,000 on the 1st of July next for the statutory loans and as to the banks to £584,900), provided their interest is paid according to the provisions of the scheme.

I am unable to see the unfairness of the above provisions towards the outside creditors. The object of the provisions is to give breathing time to the company and to allow them to avail themselves and all concerned of the expectation of recovering the company's financial position. Their position has certainly been improving since the year 1887. In that year their surplus profits, after paying working expenses, amounted only to £1500. In 1888 there was a profit balance of £62,800 in the year's working. On the 1st of January, 1889, the management passed to the joint committee. Considerable expectations were raised from the operations of the joint committee by reason of the cessation of the keen rivalry which had existed between the two dock companies and of the reduction in the expenses of management, and by reason of other causes. These expectations have already been realized to a certain extent. In the first half of 1889 the net profit coming to the *East and West India Dock Company* was nearly £49,000; the accounts for the second half of that year have not been made up, but it is expected to amount to about £50,000, but not to exceed that sum, a result partly attributable to the recent strikes. The full benefit of the Act of 1888 has not yet been reached; onerous contracts entered into by this company are still in process of running off, and the benefit of reduced expenditure and increased rates is only gradually experienced and obtained. It is said by the opponents to the scheme that it will fail. They may prove to be right, but amongst the statutory loan creditors and amongst the outside creditors (Messrs. *Truman, Hanbury, & Co.*), who have agreed to take the deferred stock, there are many persons of great experience who think there is a reasonable prospect of success. The great *London* banks who have assented seem to be of the same opinion; and it is a remarkable fact that evidence has been given on the part of one of the opponents (Messrs. *Lucas & Aird*), which appears to place the market value of the deferred debenture stock at about 50 per

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cent. Stockbrokers of great experience and high position have been consulted on the subject, and their opinion is that the market value of the stock would not exceed from £50 to £55 for every £100 nominal of such stock.

Other objections were raised, but it is not necessary to deal with them in detail. My conclusion is that the scheme has been prepared in good faith on the part of the company, and that, when considered as a whole, it presents to the outside creditors, for their acceptance or rejection, a proposal of arrangement which in the circumstances of the case cannot be said to be unfair and which I think is fair, and that it does not deprive them or tend to deprive them of any reasonable prospect of being paid their debts. The statutory loan creditors make considerable concessions, and the stock-holders of the company take no dividend until the interest on the deferred debenture stock is paid. The outside creditors cannot touch the undertaking itself, they cannot obtain an order to wind up the company or in any way obtain a *cessio bonorum* against it, nor any general administration of its property. The limited administration of the profits of the undertaking, such as it is, under the order founded on the 4th section of the Act of 1867, will not be stayed by the scheme. The position of the outside creditors is evidently very unfortunate and their prospects of payment, apart from the scheme, are not hopeful. From the facts already stated it is a problem which they may endeavour to solve if they think fit, whether there is in law or in fact any property outside the undertaking which can be successfully reached by them.

I am satisfied that no sufficient objection to the scheme has been established, and I, accordingly, confirm it. The order will be prefaced by a declaration that the Court is of opinion that according to the true construction of the scheme it does not bind and does not purport to bind the outside creditors to accept the deferred debenture stock in satisfaction of their debts.

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Kirk & Randall appealed. The appeal came on for hearing on the 7th of February, 1890.

Moulton Q.C., *Byrne*, Q.C., and *Farwell*, for the Appellants:—

Our objection to this scheme is that it prejudices the outside creditors. Everything on which the unsecured creditors could lay their hands is swept into the scheme, and half of it is set aside to pay interest on mortgages and debenture stock. The other half is set aside to redeem the deferred debenture stock which the scheme gives power to create. The Act did not intend to take anything away from outside creditors. They are not bound by a scheme, but the Court has always said that it will not confirm a scheme which prejudices them. Though the scheme does not bind an outside creditor, it prejudices me if it sweeps away all the money to which I could have had recourse. If the Court can sanction the money being thus dealt with, I am prejudiced; if it cannot, it ought not to sanction a scheme which purports so to deal with it. Mr. Justice *Chitty* seems to have thought that an outside creditor could lay hold of the money if he was quick enough, and that therefore he was not damnified, but it is difficult to see how the creditor could lay hold of anything. The creditors who ought to be considered by the Court in a scheme of this kind under sect. 6 of the *Railway Companies Act*, 1867, are the outside creditors who have no charges at all, whereas the learned judge below has considered only the secured creditors. The scheme has come before the Court on insufficient evidence, for it does not appear what are the free assets to which the outside creditors can resort. There are two fatal objections to the scheme: one is that it sweeps in the whole of the available assets of the company, so that, if the scheme were adopted, there would be no free assets available for the outside creditors. The assets these creditors look to are, the money arising from the sale of superfluous lands, and any money which may come in after the receiver is discharged. The other objection is that the company take upon themselves to liquidate debts and liabilities to unsecured creditors by the issue of deferred debenture stock at par. That is to say, instead of there being, as there ought to be, equality among the outside creditors, the company may pick and choose the creditors to whom debentures shall be issued, and then buy

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back at par, perhaps the very next day, any debentures so issued. Such a power ought not to be conferred on the directors of this company, for they might, and probably would, use it to favour particular creditors. This scheme cannot be proper if it enables one outside creditor to be preferred to another. Even if the scheme only indirectly or incidentally affects outside creditors, it may not the less be an injury to them. It was never intended by the *Railway Companies Act*, 1867, that by a scheme under that Act a security should be given to the secured creditors of a company which they did not possess before, to the prejudice of the outside creditors. This scheme either prejudices outside creditors, or it fails to shew that it does not affect them. No case is to be found in which the Court has ever appropriated outside assets—that is, assets open to the general outside creditors—to the loan creditors. The purport of these schemes under the Act is not to deal with outside creditors at all, for that is beyond the spirit and intention of the Act; but if they are dealt with at all, it should be in such a way as not to interfere with their rights. In *In re East and West Junction Railway Company* (1), referred to by Mr. Justice *Chitty*, there was an express power in the special Act for the company to raise new loan capital, and therefore to override the general creditors. Again, the learned judge has not correctly stated the effect of *In re Hull, Barnsley and West Riding Junction Railway Company* (2). We submit that the practical effect of the judgment of the Court of Appeal in that case is that outside creditors are not intended to be prejudiced by the Act. *In re Cambrian Railways Company's Scheme* (3), *In re Bristol and North Somerset Railway Company* (4), and *Re Somerset and Dorset Railway Company* (5) shew that the powers of the Court under the Act will be exercised with a due regard for and without prejudice to the rights of outside creditors.

[Lindley, L.J., referred to *In re Letterkenny Railway Company* (6).]

(1) Law Rep. 8 Eq. 87.
(2) 40 Ch. D. 119.
(3) Law Rep. 3 Ch. 278.
(4) Law Rep. 6 Eq. 448.
(5) 18 W. R. 332.
(6) I. R. 4 Eq. 538.

Latham, Q.C., *Pollard*, and *Howard Wright*, for the company :—

As to the point that the company can pick and choose among the outside creditors, we say the company could not give any such preference; but the point was met in the Court below, as stated in the judgment, by the company undertaking to offer the deferred debenture stock to all the unsecured creditors. That offer was, however, refused: but we are still willing to have that undertaking inserted in the judgment. The outside creditors are not bound by this scheme and may disregard it, for it does not withdraw the company's property from any process an outside creditor may take. A going company, as this is, may apply its funds in any way authorized by its constitution; it is not bound to keep them to await execution by a creditor. But this scheme is really an advantage to the outside creditors, because it prevents judgment creditors coming in in advance of them, and ear-marks the fund to a particular account. It is the settled law that outside creditors are not bound by, and get no benefit from, a scheme under the Act, and, therefore, in drawing a scheme it is proper to omit all reference to them. The only way in which they are referred to in the present scheme is as indicating the amount of deferred debenture stock which may be issued in liquidation of the debts due to them. This scheme is, and ought to be, a statutory arrangement between the secured creditors only and the company: *In re Cambrian Railways Company's Scheme* (1).

Sect. 4 of the *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), in giving a judgment creditor another remedy for the right of taking in execution the rolling stock and plant of a railway, which the Act prevents him from exercising, deprives him of the means of gaining priority, and the result of that section and of the decisions is that as long as a receivership order made under the Act remains in operation all the creditors of the company come in *pari passu*: *In re Mersey Railway Company* (2).

When this scheme is looked at it does not purport to bind the outside creditors in any way, nor does it take away anything from

(1) Law Rep. 3 Ch. 278. (2) 37 Ch. D. 610.

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them. It leaves them to their legal rights. It would not prevent an execution creditor from getting at the assets wherever he found them. The argument for the Appellants has for its basis that outside creditors are bound by the scheme, and if they are not, it falls to the ground. It is not enough for them to say that their position is altered by the scheme, for any scheme, whatever its provisions, must in some sense alter the position of outside creditors. Even the scheme most to their advantage would do so. And they cannot be entitled to object on this ground, for if so, there never could be any effective scheme at all unless every single outside creditor was settled with.

The scheme, however, is in reality a great advantage to the Appellants, for it suspends the remedies of a mass of creditors who were in front of them. It is a fair and reasonable scheme, giving to everybody the best prospect of obtaining payment, and unless it is to be taken that the true object of such a scheme is to put the unsecured creditors in a better position than the secured, and to defer the secured to the unsecured, the present scheme cannot be objected to.

They also referred to *Stevens* v. *Mid-Hants Railway Company* (1).]

Byrne, in reply:—

The Court has no statutory power to improve a scheme; it can only confirm or reject it, and although outside creditors may not purport to be bound by it, a scheme which prejudicially affects their interests, and which not only leaves them out in the cold, but may enable the company to prefer some to others of them, ought not in the face of opposition to be confirmed by the Court.

1890. Feb. 12. Cotton, L.J.:—

This is an appeal against an order of Mr. Justice *Chitty*, confirming a scheme proposed by the *East and West India Dock Company*.

The *East and West India Dock Company* is a company which is authorized to make a railway sufficiently to bring it within the

(1) Law Rep. 8 Ch. 1064, 1068, 1069.

provisions of the Act of 1867; but I need hardly say that the principal part of its undertaking is its dock. There has been a scheme proposed under the Act, which is necessarily prefaced by a declaration under the seal of the company, and by an affidavit, that the company is unable to pay its creditors. Two receivers have been appointed, one a receiver and manager under the 4th section of the Act of 1867, which receivership would include only the undertaking and the profits arising from the undertaking, and then, in an action brought by one of the creditors, another receiver and manager has also been appointed.

The scheme is opposed by people who are in the position of large creditors of the dock company. They are contractors, who were originally employed by the dock company to construct their new docks at *Tilbury*. I need not enter into the question in dispute between them and the company, but there is litigation between them, there is a decision of the other branch of the Court of Appeal in favour of the contractors, and an appeal to the House of Lords is pending against that decision; so at present they are in this position, that they are *primâ facie* creditors of the dock company, but have not got any judgment as against the company, nor any lien or charge on any property of the company.

Now, what are the objections which are raised to this scheme which Mr. Justice *Chitty* has confirmed? It is said that this scheme professes to do what it is well established that a scheme under the Act cannot do—to bind outside creditors. By outside creditors I mean those classes of creditors who do not come within the provisions of the Act so as to make their consent to the scheme necessary. They are simply creditors. I do not rely in any way upon this, that another creditor who did oppose has ceased to oppose. I do not think that comes in question on this part of the case, in which it is said that this scheme professes to do that which it cannot do.

I will only refer at present to two of the cases cited before us. The first, which came before Lord *Cairns* when Lord Justice, was the case of *In re Cambrian Railways Company's Scheme* (1). It does not directly bear on the question which is now before us—the

(1) Law Rep. 3 Ch. 278.

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confirmation of the scheme—but it lays down usefully the principles which have to be considered on an application to confirm a scheme. In that case there was an application under sect. 7 of the Act, which provides that after the filing of the scheme it shall be lawful for the Court to stay any action, and the question there was whether the Court would, having regard to the scheme, stay the action. What Lord *Cairns* said was, that the scheme proposed to do that which it could not do so as to bind the creditors, and he also said that it was not a scheme on the ground of which he would stay the action of a creditor, the creditor not in any way being bound by the provisions of that scheme. Lord *Cairns* (1) lays down a principle which I think will be useful in guiding us to a decision whether Mr. Justice *Chitty* was right in confirming this scheme: "Without professing to lay down any rule which is to meet every case, I cannot think it would be right that the Court should suspend the proceedings of any unpaid landowner, or, indeed, of any outside creditor, unless it saw that a scheme was proposed in good faith, which, if it reached maturity, would afford a reasonable prospect of providing for the payment of the claims of creditors, and thus compensate them for a temporary suspension of their remedies." That throws light and is a guide, I think, as to what we should look to when we come to decide whether the scheme purports in any way to deprive a creditor of his rights. The other case is that of *In re Bristol and North Somerset Railway Company* (2). Lord Justice *Giffard* there referred to the case before Lord *Cairns*, and held that as there were provisions which directly purported to alter the position of the creditors by compelling them to give up their position as creditors and to take another and different position as shareholders, the scheme ought not to be confirmed without their assent.

The scheme now before us provides a suspense period during which the creditors who could be bound should not pursue their remedies, and then it provides that what have been called free assets shall be dealt with in a particular way, partly to provide for paying interest upon the interest accruing due to creditors who were restrained from suing, and which, according to the

(1) Law Rep. 3 Ch. 299. (2) Law Rep. 6 Eq. 448.

scheme, was to be funded, and partly to provide for the redemption of deferred debenture stock, which the scheme allows to be issued to creditors, not in any way purporting to compel creditors to take it, but enabling the company to issue this additional debenture stock to creditors who choose to take it in satisfaction of their debts. Does that purport to deprive creditors of any right? In my opinion it does not. It is very true it takes away from the creditors this money, in this sense, that the money so to be held according to this scheme, which is a bargain binding on the company and on the present debenture-holders, is not to be held by the company as their free assets. That is true. The company are bound by the contract contained in this scheme to appropriate this money partly in favour of the creditors whose remedies are suspended for a time, and partly for the debenture stock which is to be created under the scheme; but that does not in my opinion deprive a creditor of any right. The outside creditors have no lien or charge upon any money. They are simply in the position of creditors of the company. Creditors of an individual, unless they have a mortgage or charge, cannot say that if he squanders his money he deprives them of any right or interest which they have, and in the same way creditors of a company, if they have no lien or charge on any assets, cannot complain of the way in which the company disposes of those assets. Here all that the scheme does is this—if confirmed by the Court it enables the company to give to outside creditors a charge of a certain nature on the assets. Apart from any scheme the company might, if it was so minded, give an outside creditor who was suing them a charge on the assets. If the company did not do so, then the Appellants, if they established their rights as creditors, would be able by ordinary process of law to get payment out of the free assets. No doubt that remedy is to some extent affected by the scheme, because (and I think here that Mr. *Byrne* was right) in consequence of this scheme these free assets become bound, as between the company and the persons bound by the scheme, to be applied, not as assets free from any obligation on the part of the company, but in the way provided by the scheme. But although that may affect the creditors—and we have to consider hereafter whether on the whole the scheme,

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having regard to all its provisions, is a fair one, and provides a reasonable prospect for payment of the creditors; yet in my opinion it does not deprive the creditors of any right which they have, taking "right" in this sense—anything which they have a right to enforce by legal process in consequence of any charge, or lien, or mortgage which they have on any assets of the company. It is almost a necessity that there should be in a scheme like this, a dealing with some property of the company which was previously free, and could be dealt with by the company as it thought fit—some provision taking that property from the ordinary power of the company and appropriating it; but that cannot be complained of by creditors who have not any legal interest or legal right in the nature of a mortgage or lien upon that property. In my opinion the objection taken to the scheme that it goes beyond the powers given by the Act cannot prevail.

But then we have to consider whether this is a scheme which against dissentient parties the Court ought to confirm. Under the Act the Court is to hear directors and creditors and others, and if the Court is satisfied that all the necessary assents have been given—which there is no question has been done here—"and that no sufficient objection to the scheme has been established," it may confirm the scheme. Of course, if the scheme goes beyond the power given by the Act, it is *ultrà vires*, and the Court never will sanction it, and there is an end of the matter. I think that Mr. *Latham* went too far in saying that as outside creditors are not bound by the scheme the Court ought not, on the ground of any objection relating to them, to refuse to sanction it. I think there are two answers to this. The Court ought never to sanction and confirm a scheme which, though it purports to be made under an Act, is in excess of the powers given by the Act. It would be very wrong for it to do so. There is also this point, which I shall have to refer to again. If there is expressed in the scheme something which the Court finds not capable of being enforced, it may be said that those classes of creditors and shareholders whose assent is required are deceived; that they thought a clause in the scheme to be binding which the Court holds not to be binding, and therefore the scheme ought to be

considered as not containing the agreement assented to by the shareholders and creditors whose assent was required.

We come then to the question whether there is any sufficient objection to the scheme. I have read a passage from Lord *Cairns'* judgment, which I will not repeat, for the purpose of shewing what we are to consider. I would also refer here to a passage in the judgment of Lord Justice *James* in the *East and West Junction Railway Company's Case* (1): "If I thought that the scheme deprived any creditor of any reasonable prospect of being paid, I should have had much more hesitation in confirming it; but I cannot help seeing that unless some scheme is resorted to there is nothing for the company and nothing whatever for the outside creditors."

I do not apply the last words to the present case, but what we have to consider is—does not this scheme afford a reasonable prospect of providing for the payment of creditors? That is really the principal object of a scheme. If the company say "We cannot pay our creditors," then a scheme must be prepared, and it will be binding as between the company and its shareholders and debenture-holders, but it is prepared with a view of paying the creditors. Of course the Court considers also what is reasonable and what is for the benefit and interest not only of the outside creditors, but of persons who are interested in the company as debenture-holders and as shareholders. Here there are creditors to a very large amount who have an actual present right against the company for payment, there are large claims for £160,000, and more in respect of arrears of interest, and there are large claims for capital due, I think to the extent of some £300,000, and there will be much more due before we get to the middle of the year. As to the greater part of these large claims there is no dispute whatever. What does this scheme do as regards them? Practically for a period of ten years it suspends the actions of those holders of mortgages or charges who are in the undoubted position of creditors entitled to immediate payment. Now we know that the company is going on better, and that there is every prospect of considerable increase in its profits, and if that is so, is not the suspension of actions by

(1) Law Rep. 8 Eq. 93.

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debenture-holders an enormous benefit to everybody. It is true that in order to enable the company to get that benefit the free assets are dealt with, but dealt with in a way which, as far as I can see (and that was Mr. Justice *Chitty's* view), is a reasonable way of providing for the better success and future prosperity of this company. That, of course, is a way of providing the means of paying its creditors. No doubt it does not give these outside creditors any direct charge on the property, but it does, as far as one can see, afford a reasonable prospect of, and a reasonable mode of providing for, paying them. The scheme provides for debenture stock to be given to the creditors who like to accept it, and then there is a provision to enable part of the present surplus assets to be applied in payment of that debenture stock. It was said: "There is no provision requiring the directors to give this debenture stock to all creditors who are willing to take it, and there is no provision made as to directing them to apply in any particular way the proceeds of that portion of the free assets to pay the particular creditors." The company then offered to give an undertaking to offer this debenture stock either to the particular opponents or to all creditors who are willing to take it, and to apply money in their hands for the purpose of redeeming it. It was objected, and I think rightly objected, that it would not be right for us to require or take that undertaking, because it might be regarded as making an addition to the scheme. I therefore think that we cannot ask the dock company to give that undertaking, or take that undertaking when offered by them. But in my opinion the Court ought to trust the directors of the company to act in a proper and reasonable way in exercising the powers given them by the scheme; and in my opinion it would not be a proper exercise of those powers if they used them capriciously or arbitrarily in favour of creditors whom they favoured, and as against creditors with whom they had some quarrel or whom they disliked. The directors ought to exercise the power thus given to them in a way which will prevent any one from saying that any of their acts have been done arbitrarily or because they had any particular feeling for or against any particular creditors. I think, then, that to avoid its being suggested that we are imposing any new term or making an altera-

tion in the scheme—which we have no power to do—it will be better not to receive that undertaking, though offered; but I express my opinion, so that there may be no doubt as to the way in which I think these powers ought to be exercised.

Then there is another matter to which I must refer. I said there had been two receivers and managers appointed. One of them was a receiver and manager appointed at the instance of a creditor who was bound by the scheme, and that was a mere *interim* order for *interim* management. Of course if this scheme is confirmed, as the creditor who obtained that receivership is bound by the scheme, there will be an end of that receivership; but as regards the order of the 12th of March, 1888—an order made under the 4th section of the Act—in my opinion the scheme in no way gets rid of that receivership order. Of course as regards any creditor who is bound by the scheme, he, so far as the scheme interferes with any rights which he would otherwise have under that receivership order, cannot insist upon them; but outside creditors and any other persons who are not bound by the scheme, retain, notwithstanding the scheme, all such rights as they had under that order. Of that I have no doubt: and therefore no objection on that ground can be taken to what has been done. As regards those in the position of mere outside creditors, that receivership order still remains, and there are judgment creditors who are entitled to the benefit of that order; but when all those judgment creditors are paid, then under the powers given by sect. 4 of the Act the Court may, if it thinks right, discharge the receiver and put an end to the proceedings under that receivership order.

In my opinion the judgment of Mr. Justice *Chitty* was right, and the appeal fails.

LINDLEY, L.J.:—

In order to deal with this case it is necessary to consider the theory of schemes under the *Railway Companies Act* of 1867. The provisions of that Act come into force in the case of railway companies which are in difficulties. The first condition of the application of the Act is, that they shall not be able to pay their creditors. It is no part of the object of the Act to wind up a

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company in the sense in which a joint stock company is wound up under the winding-up Acts. The theory is that the company is to be kept going, and steps are to be taken for the purpose of enabling the company to pay their way and pay off their creditors by means of a going concern. The whole of the present scheme is clearly based upon that principle. Those who have prepared it see the difficulties, and very serious difficulties indeed they are. The company cannot go on without arranging in some way with their creditors and gaining time. If they were wound up to-morrow, whether there would be 20s. in the pound for their creditors I do not know, for docks are not very saleable things, but we need not speculate on that. The scheme is based upon the principle that it is for the benefit of everybody—creditors secured and unsecured, and shareholders—that the company shall be kept going, and that opportunities shall be made for paying off creditors by degrees.

Now, having got that general view, let us see what is the nature of the provisions of the Act. We are dealing with a scheme which has been assented to by the necessary majorities of those creditors whose assents are required by the Act; but the scheme is objected to by unsecured creditors—gentlemen who are creditors for a very large amount. Unsecured creditors are not required by the Act to assent to the scheme, nor can any minority of them, however small, be bound by any majority of them, however large. No majority of unsecured creditors can bind a single dissentient. Moreover, although the unsecured creditors are not required to assent, they are entitled to be heard in opposition to the scheme, which involves the conclusion that their objections to it must be fairly and properly considered by the tribunal before whom the scheme comes for approval. Therefore, although these gentlemen are not required to assent, their dissent, and the grounds of their dissent, require to be considered.

Now, it has been said, and said with truth, that dissentient unsecured creditors are not bound by the scheme. They are not bound to take the benefits, if any, which are offered to them by the scheme. They are left to their legal remedies if they do not choose to come in under it. But although it is perfectly true

that they are not bound by the scheme in any such sense as that, it would be a great mistake to suppose that the scheme is a matter of perfect indifference to them, and that it in no way, directly or indirectly, affects their rights. The effect of the scheme is declared by sect. 18 of the Act to be this: "A scheme when confirmed shall be enrolled in the Court, and thenceforth the same shall be binding and effectual to all intents, and the provisions thereof shall, against and in favour of the company and all parties assenting thereto or bound thereby" (that does not include any unsecured creditor who does not assent) "have the like effect as if they had been enacted by Parliament."

Now, what I wish to call attention to is this, that the scheme, if confirmed, is valid and binds the company. That which binds the company binds the unsecured creditors of the company in this sense, that any disposition by the company of this property which binds the company will affect the unsecured creditors. Any trust validly created by the scheme and binding on the company will affect unsecured creditors. Unsecured creditors having no lien or charge on the assets of the company have no greater right against the property or assets of the company than the company itself has. Whatever affects me affects my unsecured creditors; so far as my property is concerned, if I give it away, so much the worse for them; they cannot follow it; they can only come against me. If I create valid trusts which are enforceable against me, and which are not open to the charge of being fraudulent against my creditors, my unsecured creditors are bound and they cannot attach that trust property. In that sense these schemes become very important indeed to unsecured creditors; and, although it is true that in one sense they are not bound, yet in another sense they are very seriously affected by them.

That being so, it becomes necessary to consider the objections which the unsecured creditors may have. If a scheme were prepared—I do not say for the purpose of cheating the unsecured creditors, because that is too gross to require comment—but if a scheme were prepared which would have the effect of leaving them unprovided for and preferring other creditors to them, the Court would be very slow indeed to confirm such a

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scheme. It is said by Mr. *Byrne* that that is really the effect of this scheme. If it were, I should think the scheme ought not to be confirmed; but let us look at it a little further. Let it be borne in mind that unless such a scheme as this is confirmed the position of the unsecured creditors will be very unsatisfactory; there will be immediately a competition and rush for priority, which will be extremely disastrous to everybody except those who are fortunate enough to get priority. That is an evil which we at all events are quite able to appreciate. The position of this company is such that by next July what are called the free assets of the company would be, if not wholly swept away, to a very large extent swept away long before the opposing unsecured creditors would be in a position to put in force any judgment which they might get. They have not got judgment yet. It is not, so far as I can see, to their interest to prevent any scheme being carried out. It would not be to their advantage to leave this company to struggle with its creditors at the risk—and the imminent risk so far as they are concerned—of being left out in the cold by reason of other creditors getting priority in a rush for payment. Although the scheme, therefore, does affect the property of the company, and consequently does affect the unsecured creditors, we must look at the other side and see what the scheme does for them. The great feature of this scheme is that it prevents the rush and competition and struggle for priority to which I have alluded, and which would be perfectly fatal to the company and fatal to everybody who was not first in the field. Those secured creditors who are in a position to issue *fi. fas.* and execution against the company suspend their rights for ten years—and other persons who will be in a position next July if nothing is done to obtain judgments against the company, suspend their rights for the same period. That is an immense set-off against any withdrawal of assets from persons like Messrs. *Kirk & Randall.*

Looking, therefore, at the thing as a whole, as I think we ought to do, not looking at and deciding against the scheme simply because some unsecured creditor, however large, is affected by it, but looking at it as a whole, we must ask ourselves, in the language of sect. 17, whether any sufficient objection to the

scheme has been established; and the conclusion to which I have arrived after attending to Mr. *Byrne's* and Mr. *Moulton's* very able arguments on behalf of their clients is, that this is a thoroughly honest scheme, and intended to do the best, and so far as I can see doing the best, for all concerned in the very unfortunate circumstances with which the company and the Court have to deal and to grapple.

With reference to the point made, that under clause 7 of the scheme the company may prefer unsecured creditors and issue deferred debenture stock to some, and refuse to issue it to others, I do not think that we ought judicially to suppose that the company will be guilty of unfair dealing. One sees why the power is framed in this way; it is because some of the unsecured creditors may prefer not to have deferred debenture stock—they may prefer to go without it, and exercise such rights as they may be entitled to exercise; but I am not prepared to suppose that if an unsecured creditor comes and asks for deferred debenture stock in pursuance of the scheme, the company will say "No; we have had a quarrel with you, we will not give it to you." It is not likely; it is not businesslike, and I am not prepared to withhold my consent to the scheme, because it is just possible that the power conferred by the scheme may be abused. I shall assume that it will be acted upon in the spirit in which it is asked for, and with which, as far as I can judge, it is likely to be carried out.

Upon the whole, therefore, it appears to me that this is a scheme which we ought to confirm, and that the appeal ought to be dismissed.

LOPES, L.J.:—

I have only to say that I believe this scheme likely to be beneficial to all concerned, secured and unsecured creditors. It appears to me to be a reasonable scheme, and I can see no sufficient objection that has been made against it which would justify this Court in refusing to confirm it.

Solicitors: *Mackrell, Maton, & Godlee; Freshfields & Williams.*

H. C. J.

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Feb 12.

COOKE *v.* SMITH.

[1889 C. 67.]

Court of Chancery of County Palatine of Lancaster—17 & 18 *Vict. c.* 82, *s.* 8 [*Revised Ed. Statutes, vol. xii., p.* 95]—*Defendant out of the Jurisdiction —Transfer from Palatine Court to High Court.*

Persons who had assigned property in trust for their creditors brought an action in the Court of the County Palatine against the trustees and a purchaser from them, for accounts, and to impeach the sale, alleging fraudulent dealings by the trustees and a collusive sale at an undervalue. The property was within the jurisdiction of the Palatine Court, and all the parties resided within it at the time of the sale; but one of the trustees, whose conduct was especially impeached, had since gone to reside out of the jurisdiction of that Court. By leave of the Court of Appeal, service on him out of the jurisdiction of the Palatine Court was effected. He then applied to transfer the action to the High Court. The other Defendants, except a Defendant having a very small interest concurrent with that of the Plaintiffs, supported the application:—

Held, without laying down any general rule, that the applicant being the principal Defendant, no sufficient reason was shewn in this case for obliging him to defend the action in the County Palatine, and that it ought to be transferred to the High Court.

By indenture, dated the 29th of December, 1876, the Plaintiffs and the Defendant *Joseph Cooke*, who carried on business as iron manufacturers in partnership at *Barrow-in-Furness*, assigned the business and the business property to the Defendants *Smith & Storey*, upon trusts for the benefit of their creditors. The *Barrow Hæmatite Steel Company* (hereinafter called the company) were large creditors, and executed the deed. In 1889 the Plaintiffs issued a writ in the County Palatine against *Smith & Storey*, the company, and *Joseph Cooke*, claiming an account of the receipts and payments of *Smith & Storey*, as trustees of the creditors' deed, an account of all moneys expended by them in improvements on the works, an account of all materials supplied by the company to the trustees on account of the works, a declaration that the sale or transfer of the works to the company by *Smith & Storey* "was fraudulent and void, and a breach of trust," and that it might be set aside, and that the works might be delivered up to the Plaintiffs, and the balance, if any, that should be found due to them, paid.

Smith had formerly resided at *Barrow-in-Furness*, but in 1888

went to reside near *Stratford-upon-Avon*. All the other Defendants were within the jurisdiction of the County Palatine.

On the 24th of January, 1890, the Court of Appeal, on the *ex parte* application of the Plaintiffs under 17 & 18 Vict. c. 82, s. 8, gave them liberty to serve the writ and a copy of their order on *Smith* at *Stratford-upon-Avon*, or elsewhere in *England* or *Wales*. *Smith* now moved under the same section to transfer the action to the High Court of Justice, Chancery Division.

The statement of claim alleged, among other things, to the effect that at the date of the deed *Smith* was the managing director of the company, and as such supplied the materials necessary for carrying on the business of the partnership, and made for them charges largely in excess of the market price; that *Smith & Storey* expended large sums in improvements of the works contrary to the terms of the deed; that in 1883 *Smith & Storey* proposed to sell the property comprised in the deed to the company in consideration of the company paying what remained due to the other creditors; that *Smith & Storey* obtained the assent of the creditors to the sale by misrepresenting to them the value of the assets and the position of the business and the amount due to the creditors; that if the sale was effected it was at a gross undervalue, and made solely in the interests of the company, and was a breach of the trusts of the deed; that *Smith & Storey* had retained out of the profits of the business large sums for their own use.

Storey approved of the application to transfer to the High Court. The company also supported it, and their treasurer deposed that the deeds and documents relating to the works were at the company's offices in *London*, and the books of account, which would be wanted in case of a judgment for account being given, were at *Barrow*, and could better be sent to *London*, where the company had an office, than to *Liverpool* or *Manchester*, at neither of which places had the company any office.

Smith deposed that he spent several days of each week in *London*, and that the action could be tried with much greater convenience to him, and, as he believed, with equal convenience to the other parties, in *London* instead of the County Palatine. That he believed that he should be the principal witness, and that not many other witnesses would require to be examined.

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That probably witnesses from *Sheffield* might be called, but that whether witnesses resided at *Barrow* or *Sheffield*, the time and expense attending the journey to *London* would be little more than that of a journey to *Liverpool* or *Manchester*. That the charge of fraud could only be directed against him and *Storey*, and he desired to vindicate his character in the High Court.

Joseph Cooke opposed the application. It was deposed to that, from an examination of the books of the partnership, his share in the capital of the partnership about the time when the assignment was made appeared to be less than £300, the total capital being upwards of £11,000.

Farwell, for the application :—

This Defendant is the principal Defendant, and ought not to be deprived of his right to have his case tried before the High Court. Where a person out of the jurisdiction is the sole defendant, if the Court will order service on him at all it will only do so under very special circumstances (*In re Watmough* (1)), and where he is the principal defendant the same principle ought to be applied. Where a defendant out of the jurisdiction has only a small interest he ought not to be allowed to inconvenience the principal parties by compelling them to have the action tried by the High Court, but when he is the principal defendant he ought to be sued where he is. He is charged with improper and fraudulent conduct and desires to clear himself before the High Court.

Neville, Q.C., and *T. E. Mansfield*, for the Plaintiffs :—

Here there is only one defendant out of the jurisdiction of the Court of the County Palatine; the object of the action is to recover property in the county, and the acts complained of were all done within the county. The Court of the County Palatine is therefore the most proper Court for trying the case. A transfer to the High Court will not secure the trial of the case in *London*, for if it were made we might still succeed in getting the action tried in *Lancashire*, though not in the Palatine Court.

T. E. Mansfield, for the Defendant *Cooke*, also opposed the application.

(1) 24 Ch. D. 280.

COTTON, L.J.:—

I am of opinion that this application ought to be granted. I do not say that there is any general rule as to these cases; each must be decided according to its own circumstances. The Plaintiffs desire to bring the case within the limited jurisdiction of the County Palatine. All the parties but one reside within the jurisdiction; the action relates to property within the jurisdiction, and probably all the acts relating to it were done within the jurisdiction. Still, I think that no sufficient ground is shewn for bringing the applicant within the limited jurisdiction. He is the principal Defendant, he is not resident within the jurisdiction, and in my judgment there is no sufficient reason for obliging him to defend himself before a Court within the jurisdiction of which he does not reside.

LINDLEY, L.J.:—

What we have to consider is what course is "best calculated to answer the ends of justice." Right will be done to the parties whether the action proceeds in the High Court or in the Palatine Court; but in which of the two is it most reasonable that it should be tried? *Smith* is the person principally attacked in this action; he is not resident within the jurisdiction of the Court of the County Palatine, and I see no reason why he should be dragged within it. We lay down no hard and fast rule; each case must be decided according to what is right and proper under its circumstances.

LOPES, L.J.:—

Smith is the principal Defendant, and I think that he ought not to be sued in a Court within the jurisdiction of which he does not reside.

Solicitors for Appellant: *Currey, Holland, & Currey.*

Solicitors for Plaintiffs: *Trass & Jarmain,* agents for *Frank Taylor, Barrow-in-Furness.*

Solicitors for *Cooke: Trass & Jarmain,* agents for *James Park, Barrow-in-Furness.*

H. C. J.

C. A.
1890
Feb 13, 11.

In re DILLON.
DUFFIN *v.* DUFFIN.

[1889 D. 143.]

Donatio mortis causâ—Banker's Deposit Note—Cheque indorsed on Deposit Note.

A testator who held a banker's deposit note for £580, in his last illness and very shortly before his death, took out the note, filled in and signed upon a stamp a form of cheque indorsed on the note, "pay self or bearer £580 and interest," and handed the document to a relation who was attending him in his illness, telling her that she was to give it back to him if he recovered, and if not she would be all right:—

Held (affirming the decision of *Kekewich*, J.), that there was a valid *donatio mortis causâ*, for that, assuming a *donatio mortis causâ* of a cheque not presented in the drawer's lifetime to be invalid, the intention here was not merely to give the cheque but the deposit note; that a deposit note is a good subject of a *donatio mortis causâ*, and that the gift was not defeated by the giving the cheque along with the note.

In re Mead (1) distinguished.

JAMES DILLON, the testator in this action, was holder of a deposit note of the *London and Westminster Bank, Lambeth* Branch, for £580, the material part of which was as follows:—

"Received from Mr. *James Dillon* Five hundred and eighty pounds to the credit of his deposit account.

"For the *London and Westminster Bank*,
"*A. T., pro* Manager."

"This deposit receipt is not transferable. The amount is repayable on demand, but will bear no interest unless it remains undisturbed for one month. The rate of interest is subject to alteration, of which notice will be given by advertisement in the *Times* newspaper. When the money is withdrawn or the interest paid the depositor must sign the cheque on the back hereof, first affixing a penny stamp. If part only is withdrawn a new receipt will be given for the balance."

(1) 15 Ch. D. 651.

On the back of the note was a form of cheque:—

"To the *London and Westminster Bank, Limited,*
"*Lambeth* Branch.
"188 .
"Pay to self or bearer and interest."

On the 9th of January, 1887, the testator made his will, of which he appointed *Francis Duffin, Emma Duffin,* and *Catherine Duffin* executors. He bequeathed to *Emma Duffin* a house in *Walworth,* absolutely, and gave her a life annuity of £10.

On Wednesday, the 11th of January, 1888, the testator, who was a widower without children, was taken ill, and *Emma Duffin,* who was his sister-in-law, went to attend to him.

The evidence given by *Emma Duffin* was to the effect that the testator took the deposit note out of his chest and said, "I am going to give it to you, conditionally. If I get well, you will give it me back; if not, you are all right." That he then filled up the cheque by inserting the date and amount—£580—adding the word "bearer," after "self or bearer," and signed it upon a 1*d.* stamp, and gave it to her, saying, "Now, you understand, if I get well, you'll give it me back; and if not, it will be all right." No other person was present at this transaction.

On the 15th of January, 1888, the testator died.

Some of the persons interested under the will disputed the gift, and an originating summons was taken out by one of the residuary legatees to have it decided whether there was a good *donatio mortis causâ* to *Emma Duffin* of the deposit note and the money due upon it. On the 18th of March, 1889, *Stirling,* J., in Chambers, made an order directing an inquiry whether the deposit note was effectually given to *Emma Duffin* as a *donatio mortis causâ* or whether the money secured thereby still formed part of the testator's estate; and it was directed that the evidence on the inquiry should be taken by affidavit, but that cross-examination thereon should be in Court before the Judge.

The inquiry was adjourned into Court before *Kekewich,* J., and *Emma Duffin,* and some other persons who had made affidavits in her behalf, were orally cross-examined.

Kekewich, J., came to the conclusion that the evidence of

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Miss *Duffin* was to be believed, and that there was a good *donatio mortis causâ* of the sum on deposit. The Plaintiff appealed.

Cozens-Hardy, Q.C., and *Methold*, for the Appellant:—

The document delivered to Miss *Duffin* could not be the subject of a *donatio mortis causâ*. It was in fact no more than a cheque payable to bearer; it was not presented before the testator's death, and by that event it was revoked. The money on deposit could not be drawn out without signing the cheque at the back of the deposit note. Without the cheque the note was useless. It has been repeatedly held that a testator cannot give a cheque of his own as a *donatio mortis causâ*: *Hewitt* v. *Kaye* (1); *In re Beak's Estate* (2); *Clement* v. *Cheesman* (3); *In re Mead* (4). The Respondents rely on two cases in which the gift of a deposit note has been held to be a good *donatio mortis causâ*. One is *Amis* v. *Witt* (5), where no reason is given for the decision; and the other, *Moore* v. *Moore* (6), simply followed *Amis* v. *Witt*. Nothing appears in either case as to the form of the deposit note. Neither of those cases was before the Court of Appeal, and the Court is not bound by them.

[LINDLEY, L.J., referred to *Veal* v. *Veal* (7).]

There does not seem to be any sufficient reason why money on deposit should be the subject of a *donatio mortis causâ*, when money on a current account is not; but treating the distinction as established, this really was a current account, for a cheque could be drawn upon it at any time. A cheque on a current account cannot be the subject of a *donatio mortis causâ*, because it is revoked by the death of the drawer, and here the gift depends on the cheque: *In re Mead*.

[COTTON, L.J.:—In that case the donor never intended to give the deposit note and the money it represented, but only to give the donee a cheque upon it. If a deposit note is a good subject of *donatio mortis causâ*, the only question will be whether the signing of the cheque alters the case.]

(1) Law Rep. 6 Eq. 198.
(2) Ibid. 13 Eq. 489.
(3) 27 Ch. D. 631.
(4) 15 Ch. D. 651.
(5) 33 Beav. 619.
(6) Law Rep. 18 Eq. 474.
(7) 27 Beav. 303.

We say that the existence of the memorandum on the note makes the account a drawing account, and that this was a gift of a cheque. But supposing the document one that could be the subject of a *donatio mortis causâ*, we say that the evidence is insufficient to establish the gift, for it is only the uncorroborated evidence of the claimant and not sufficient to establish a claim against the estate of a deceased person, especially as the circumstances render such a gift as this very improbable.

Warmington, Q.C., and *Bramwell Davis*, for *Emma Duffin*:—

A deposit note is a good subject of a *donatio mortis causâ*, and it does not signify whether it is indorsed by the deceased or not. There can be no distinction between it and a cheque drawn in favour of the deceased or a promissory note not indorsed by the deceased, both which have been held to be good subjects. The transaction between the banker and the holder of a deposit note like the present is this—the depositor lends the banker a sum of money, and the banker agrees to let him have it on demand and to pay interest while it is in his hands. The document which embodies these terms cannot for the present purpose be distinguished from a promissory note. The memorandum does not alter its effect; it is only a convenient way of getting a receipt. It was held in *Amis* v. *Witt* (1) that a deposit note is a good subject of *donatio mortis causâ*.

[COTTON, L.J.:—That case is unsatisfactory, for no reasons are given.]

Cassidy v. *Belfast Banking Company* (2) follows it.

In *Rankin* v. *Weguelin* (3) bills of exchange payable to the donor or order were held to pass by *donatio mortis causâ*. The case of *Amis* v. *Witt*, which was decided in 1863, has found its way into the text-books, and has been recognized by the Court: *In re Taylor* (4); *Moore* v. *Moore* (5); and the Court will not now disturb it. The authorities are summed up in *In re Farman* (6). In *In re Hughes* (7), Lord Justice *Cotton* treated a

(1) 33 Beav. 619.
(2) 22 L. R. Ir. 68.
(3) 27 Beav. 309.
(4) 56 L. J. (Ch.) 597.
(5) Law Rep. 18 Eq. 474.
(6) 57 L. J. (Ch.) 637.
(7) 36 W. R. 821.

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deposit note as a good subject of *donatio mortis causâ*. The cases as to cheques or bills payable to the donor help our case: *Clement* v. *Cheesman* (1), where the cheque required indorsement, but was not indorsed; *Veal* v. *Veal* (2). *Moore* v. *Darton* (3) is a strong authority in our favour. In *Duffield* v. *Elwes* (4) a mortgage was held a good subject of *donatio mortis causâ*; and in *Snellgrove* v. *Baily* (5), which has been followed in other cases, a bond. As regards the evidence, Mr. Justice *Kekewich*, who heard and saw the witnesses, was satisfied of the truth of Miss *Duffin's* story; and even if her evidence were not corroborated, that would be enough.

Methold, in reply.

COTTON, L.J.:—

Before dealing with the question of law, I had better consider the evidence. The only witness who can speak to what took place when the deposit note was handed over is Miss *Duffin* herself. She was orally cross-examined before Mr. Justice *Kekewich*, and, though she appears on one point to have made a mistake as to time, his Lordship was satisfied that her evidence was trustworthy. A slight mistake by a witness as to the time of a particular occurrence is not necessarily inconsistent with the general truthfulness of the evidence; and as Mr. Justice *Kekewich*, who saw and heard her cross-examined, was convinced of the truth of her story, I think we ought not to come to a different conclusion. It was urged that her evidence was not corroborated, and that the Court will not establish a claim against the estate of a deceased person on the evidence of the claimant alone unless it is corroborated. I do not think that this proposition is now law. Where a claimant's case depends entirely on his own evidence the Judge ought to sift that evidence very carefully; but if the claimant gives evidence which is not shewn to be inaccurate in any material point, and which satisfies the Judge of its truthfulness, he ought, I think, to act upon it though it be not

(1) 27 Ch. D. 631.
(2) 27 Beav. 303.
(3) 4 De G. & Sm. 517.
(4) 1 Bli. (N.S.) 497.
(5) 3 Atk. 214.

corroborated. In the present case, moreover, I think that there are circumstances which tend to corroborate Miss *Duffin's* evidence. Why did the deceased sign the cheque if he did not intend to give her the money due on the note? I think, therefore, that we must take her evidence as true; and, if so, there was no doubt a good *donatio mortis causâ*, if this document was capable of being the subject of one.

In considering that question I will first deal with the difference between this and the cases cited in argument. I was surprised to find that no evidence was brought forward on either side as to what was the practice of the *London and Westminster Bank* or of any other banks which put a memorandum of this kind on their deposit notes, or why they put it there. In the absence of such evidence, I come to the conclusion that, in order to preserve convenient evidence when the money is withdrawn, they put the form of cheque on the note, so that when filled up and signed it may be preserved as a receipt, and not that they make it a part of the bargain that they will not pay unless this cheque is signed and produced. If the document was lost they would require some explanation why it was not forthcoming before they paid the money; but I do not think that they could refuse to pay. I cannot think that the requiring this cheque to be signed puts the account on any footing different from that of an ordinary deposit account, so as to prevent the fund from being given away as a *donatio mortis causâ*.

It is said that this is the first time that the question whether a deposit note is a good subject of a *donatio mortis causâ* has come before a Court of Appeal in *England*, and we are asked to review the cases. There has, however, been a current of decisions in the Courts of First Instance in *England* in favour of the donations, and there is a decision of the Court of Appeal in *Ireland* taking the same view. If we go on principle, why should not this document be a good subject of *donatio mortis causâ?* It is true that the fact of the cheque having been filled in and signed does not give the donee a title at law to be paid, since the cheque was not presented till after the death of the drawer. But why should there not be a good *donatio mortis causâ* apart from the

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cheque? The case of *Duffield* v. *Elwes* (1) shews that there may be a good *donatio mortis causâ* of an instrument which does not pass by delivery, and that the executors of the donor are trustees for the donee for the purpose of giving effect to the gift. The case of *Moore* v. *Darton* (2) is very instructive as to the class of instruments which are subjects of *donatio mortis causâ*. There a document was executed when a deposit of money was made. The mere fact of the deposit would create a debt; but the document, beside acknowledging the receipt of the money, expressed the terms on which it was held, and shewed what the contract between the parties was. It was held that the delivery of that document was a good *donatio mortis causâ* of the money deposited, and so, in my opinion, was the delivery of the deposit note in the present case. The delivery gives no legal title to the donee, nor did the delivery of the security in *Duffield* v. *Elwes*; but the House of Lords there laid it down that the executors were trustees for the donee and must do what was necessary to perfect the transfer. This would not be so in the case of an incomplete voluntary gift *inter vivos*—the Court would not interfere to compel either the donor or his executors to perfect it; the doctrine is an anomalous one peculiar to the case of a *donatio mortis causâ*, but it is established by the decision of the House of Lords. Here probably the assistance of the Court might be dispensed with, as the donee is one of the executors; but I do not rely on that. If the executors had all been strangers, they must, according to *Duffield* v. *Elwes*, have lent their names to enable her to recover the money, she having an equitable title to it. The proceeding in *Cassidy* v. *Belfast Banking Company* (3) was irregular, for the executor would have been the proper Plaintiff; but the Court went on the principle that the donee had a good equitable title to the money. I am of opinion that the appeal fails. The case of *In re Mead* (4) was much relied on by the Appellant, but is quite distinct from the present case, for there the donor did not intend to give the deposit note, but only to give by means of a cheque a part of the money deposited.

(1) 1 Bli. (N.S.) 497.
(2) 4 De G. & Sm. 517.
(3) 22 L. R. Ir. 68.
(4) 15 Ch. D. 651.

LINDLEY, L.J.:—

I also agree with Mr. Justice *Kekewich* on both points. We are first asked to hold that he came to a wrong conclusion on the evidence. It would be difficult, I do not say impossible, for us to do so, as the cross examination was had *vivâ voce*, and he saw and heard the witness; but so far as I can judge from examination of the notes of the evidence, I agree with his view that Miss *Duffin's* evidence was truthful.

Then it is contended that a deposit note cannot be the subject of a *donatio mortis causâ*. Why should it not? There is at first sight this difficulty, that it is not a negotiable instrument; consequently a donee of it cannot sue on it in his own name, and the gift being voluntary, the Court according to its ordinary principles will not compel either the donor or his executors to do anything to perfect it. But that difficulty was disposed of long ago in *Duffield* v. *Elwes* (1). In that case Sir *John Leach* decided that the Court would not under circumstances like those of the present case assist the voluntary donee to obtain the benefit of the gift. The House of Lords reversed his decision, disapproved of his reasoning, and held that the principle of not assisting a volunteer to perfect an incomplete gift does not apply to a *donatio mortis causâ*. That being so, why should not the Court assist the donee in the present case? It is said that here there was no good *donatio mortis causâ*, because a man cannot make such a gift of his own cheque. I will assume that to be correct, though I think it may some day require consideration; but assuming it to be correct, I think it does not dispose of the present case. There is indeed upon the deposit note a form of cheque which has been filled up, stamped, and signed. But what is it that is given—the deposit note or the cheque? Substantially the former; and the authorities are all in favour of the view that a valid *donatio mortis causâ* may be made of a deposit note. We are asked to overrule them. It would be a strong thing to do so after they have been acted on so many years; but, apart from that consideration, I think that on principle we ought to affirm them.

(1) 1 S. & S. 239; 1 Bli. (N.S.) 497.

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In re DILLON.
DUFFIN v. DUFFIN.

LOPES, L.J.:—

The first point here is whether the *donatio mortis causâ* was proved. I think the Judge was right in believing the evidence of the donee. There was a discrepancy in her statements; but the Judge having seen and heard her, and considered the rest of the evidence, came to the conclusion that her story was to be believed; and I see no reason for thinking that conclusion erroneous. Her evidence was corroborated on almost every point on which under the circumstances any corroboration could be expected.

The second point is whether this deposit note was a good subject of a *donatio mortis causâ*. It seems to be clearly established that the cheque of another person, a promissory note, and an ordinary deposit note are good subjects of such a gift. An objection is taken here on the ground of the form of cheque at the back. In my opinion, that makes no difference. It appears to me to have been merely an arrangement by the bankers to enable them more conveniently to preserve evidence of the money having been withdrawn. I think it was clearly the intention of the donor not to give merely a cheque, but to give the deposit note. In my opinion, therefore, the conclusion of Mr. Justice *Kekewich* was quite right.

Solicitors: *Gedge, Kirby & Millett; E. Chester.*

H. C. J.

WHITBY *v.* MITCHELL.

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Feb. 14, 15.

[1887 W. 2341.]

Perpetuity—Remoteness—Possibility on a Possibility—Legal Limitation—Limitation to unborn Person for Life with Remainder to her Children born before particular Period—Restraint on Anticipation—Testamentary Power of Appointment given to unborn Person—Appointment read into Settlement.

The old rule against "a possibility on a possibility," applicable to legal limitations of real estate, namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers, is still existing, and has not been abrogated by the more modern rule against perpetuities, which prohibits property being tied up for a longer period than a life or lives in being and twenty-one years afterwards, with the addition of the period of an actually existing gestation—the two rules being in fact independent and co-existing.

By a post-nuptial settlement made in pursuance of ante-nuptial articles, freehold lands were limited to the use of the husband and wife successively for life, with remainder to the use of their issue (born before any appointment made) as they should by deed appoint. Having had issue, two daughters only, they by deed appointed one moiety of the lands to the use of one daughter for life for her separate use without power of anticipation, and after her decease to the use of such person or persons as she should by will appoint, and in default of appointment to the use of her children living at the date of that deed equally as tenants in common in fee:—

Held (affirming the decision of *Kay*, J.), that the only part of the appointment which was good was the limitation to the daughter for life for her separate use; the appointment being read into the settlement, and the latter being treated as having been made prior to the marriage of the husband and wife.

THIS was an appeal from the decision of Mr. Justice *Kay* (1).

The two children of Mr. and Mrs. *Dennis*, to whom the appointments were made, were born before the date of the settlement of 1840 which created the power.

Marten, Q.C., and *W. Baker*, for the Appellants, the three children of *Emily Hyde Burlton*:—

We contend that there is no independent rule, apart from the law against perpetuities, that you cannot limit an estate to

(1) 42 Ch. D. 494.

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children of an unborn child. Mr. *Joshua Williams*, in his Law of Real Property (1), contends that there is; but Mr. *Lewis*, in his work on Perpetuity (2), takes the opposite view. The authorities cited by Mr. *Joshua Williams* do not support his position. The opinions of Mr. *Booth* and Mr. *Yorke* (3) were given on a limitation to the children of an unborn child generally.

[COTTON, L.J.:—Those opinions both refer to the rule against a possibility on a possibility.]

It is submitted that they proceed on the principle that the limitation is bad as being too remote. In *Hay* v. *Earl of Coventry* (4) there was no limitation as to the time within which the children of the unborn child should be born. So in *Brudenell* v. *Elwes* (5).

[COTTON, L.J.:—On what authorities do you rely in support of the proposition that a limitation of this kind is good if it is within the limits of remoteness?]

On *Cattlin* v. *Brown* (6), where Lord *Hatherley* expressly lays down the rule we contend for; also on *Mogg* v. *Mogg* (7); *Routledge* v. *Dorril* (8); and *Hockley* v. *Mawbey* (9).

[COTTON, L.J.:—In none of those cases is there a decision that such a limitation as the present is valid.]

No; but there are the opinions of eminent Judges to that effect; and no one before Mr. *Joshua Williams* has ever laid it down that a limitation like this, if guarded so as to keep within the rule against perpetuities, is invalid. *Sugden* on Powers (10) is in our favour.

[COTTON, L.J.:—But in *Monypenny* v. *Dering* (11), Lord *St. Leonards* treats the old rule against a possibility on a possibility as still existing.]

On the other hand, in *Cole* v. *Sewell* (12), Lord *St. Leonards*

(1) 15th Ed. p. 323; 16th Ed. p. 314.
(2) Page 419, Appendix I., i., ii.
(3) 2 Ca. & Op. 435, 440.
(4) 3 T. R. 83.
(5) 1 East, 442.
(6) 11 Hare, 372, 375.
(7) 1 Mer. 654, 664.
(8) 2 Ves. 357, 366.
(9) 1 Ves. 143.
(10) 8th Ed. pp. 393, 397, par. 8.
(11) 2 D. M. & G. 145, 170.
(12) 4 D. & War. 1, 32.

treats the rule as obsolete. *Jarman* on Wills (1) supports our view. *Tudor's* Leading Cases on Real Property (2) treats the old rule as obsolete. In *Davidson's* Conveyancing (3) the point is treated as unsettled. But not a single case can be referred to where a limitation which comes within the limitation as to remoteness has been held bad on the ground that it was a possibility upon a possibility, and a limitation like this can hardly be held invalid consistently with *Cadell* v. *Palmer* (4).

[LINDLEY, L.J., referred to *Jarman* on Wills (5), and *Sugden's* Law of Property (6).]

But supposing the rule against a possibility upon a possibility to be still in force, it is admitted by Mr. *Joshua Williams* that it does not apply to springing uses, and the limitation here is of that nature being made under a power.

Farwell, for *Emily Hyde Burlton*:—

The limitations in the appointment of 1865 should be read as if they were in the settlement of 1840 which created the power: *Sugden* on Powers (7); the settlement being treated as if made before the marriage of Mr. and Mrs. *Dennis*. When thus read the limitations are to the use of an unborn child for life with remainder to the children of that unborn child; and, according to the old rule that you cannot limit a possibility upon a possibility, although an estate for life may be limited to an unborn child, yet a further limitation to the unborn children of that unborn child is void. That rule, which is applicable only to legal estates in land, is, I submit, still subsisting. It existed long before the modern rule against perpetuities; the two rules are quite distinct and are not merged in one another, as is contended on behalf of the Appellants: *Porter* v. *Bradley* (8); *In re Ridley* (9); *Cole* v. *Sewell* (10); *Hay* v. *Earl of Coventry* (11);

(1) 4th Ed. i. p. 279, 281; ii. p. 845.
(2) 3rd Ed. p. 473.
(3) 3rd Ed. vol. iii. p. 336.
(4) 7 Bli. (N.S.) 202; 1 Cl. & F. 372.
(5) 3rd Ed. vol. i. p. 262, note *y*.
(6) Page 324.
(7) 8th Ed. p. 470.
(8) 3 T. R. 143.
(9) 11 Ch. D. 645, 649.
(10) 4 D. & War. 1, 28.
(11) 3 T. R. 83, 86.

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Brudenell v. *Elwes* (1); *Monypenny* v. *Dering* (2); *Fearne* on Contingent Remainders, by *Butler* (3); *Burton's* Compendium (4); *Williams* on Real Property (5); *Sugden's* Law of Property (6). As to the cases cited on behalf of the Appellants: *Hockley* v. *Mawbey* (7) has no bearing on the present case, for there was no suggestion there that the appointor was contemplating an appointment to unborn children of an unborn child. In *Cattlin* v. *Brown* (8) the limitations were of equitable estates only, the legal estate being outstanding; and Vice-Chancellor *Wood* relied on and applied the rule as stated by Mr. *Preston* in his argument in *Mogg* v. *Mogg* (9), which was also a case of equitable estates. Mr. *Preston's* statement of the rule must, therefore, have been intended to apply only to equitable estates and not to contradict the rule then subsisting as to legal estates. *Routledge* v. *Dorril* (10) was a case of personal estate, to which the rule as to legal remainders in real estate does not apply. Mr. *Preston* himself says, in his work on Abstracts (11), "A remainder may be too remote and void, because it is limited to the children of a person unborn, and to whom a prior estate for life is limited." It is doubtful whether the author is there referring to the rule on which I now rely, or to the rule against perpetuities; but at all events it shews that limitations to unborn children of an unborn person to whom a previous life estate is given are void. And the author subsequently repeats his opinion (12). It is therefore, I submit, an old and well-settled rule of law which could not be abrogated except by legislation. It has never been qualified until Mr. *Lewis*, in his work on Perpetuity (13), considered it should be qualified by the more modern law of perpetuities. He does not deny the existence of the rule, but says that the doctrine of a possibility on a possibility can now scarcely be said to be of any authority. However, I submit that the weight of authority is in favour of the rule

(1) 1 East, 442, 452.
(2) 2 D. M. & G. 145, 170.
(3) 10th Ed. vol. i. p. 565, n.
(4) 7th Ed. pp. 255–6.
(5) 16th Ed. pp. 312–314; Appendix F, pp. 624–5.
(6) Pages 120, 318, 319.
(7) 1 Ves. 143, 150.
(8) 11 Hare, 372, 375.
(9) 1 Mer. 654.
(10) 2 Ves. 357.
(11) 2nd Ed. vol. ii. p. 114.
(12) 2nd Ed. vol. ii. p. 166.
(13) Pages 419, 420.

being still subsisting as a separate and independent rule, and that the decision of Mr. Justice *Kay* is right.

Renshaw, Q.C., and *Swinfen Eady*, for the Defendant *Mitchell*, supported the same view, and pointed out that his contention in the Court below was that the power of appointment by will given to Mrs. *Burlton* by the deed of 1865 was clearly void for remoteness, and that therefore the limitation in the same deed in default of such appointment was therefore void also: *Wollaston* v. *King* (1).

Alexander Young, for the Plaintiff, the acting trustee of the settlement of 1840.

W. Baker, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kay* declaring that certain limitations treated as introduced into an ante-nuptial settlement by virtue of a post-nuptial appointment under a power contained in the settlement, being limitations of legal estates, were void, not on the ground that they were void for remoteness, but that they were limitations which the law does not allow of legal estates. Now, what are these limitations? First, there is a limitation of a legal estate to an unborn child of the marriage for life, and then, after that, there is a limitation to the children of that unborn child. It is said that this latter limitation does not come within the rule against perpetuities, and that there is no other rule preventing this limitation from being good. Mr. Justice *Kay* has decided, and in my opinion rightly, that there is a rule in existence which does prevent the limitation from being good, namely, that you cannot have a possibility upon a possibility; or, to state the rule in a more convenient form, that you cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers. That is the same thing as what has been called "a possibility upon a possibility."

But it is said that, although there is such a rule in existence,

(1) Law Rep. 8 Eq. 165.

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that is superseded by the more modern rule against perpetuities. In my opinion the old rule with regard to a possibility on a possibility has not been done away with by this modern rule. It is conceded that the rule against a possibility upon a possibility existed long before the rule prohibiting the limitations of estates tending to a perpetuity existed. Can we say that the old rule has been put an end to or superseded? Mr. *Joshua Williams* lays it down that the rule still exists; while other text-writers say it does not exist. In this difference of opinion we must see what aid we can obtain from Judges and others in high position. First of all, we have *Butler's* note to *Fearne*—and the same thing is expressed in the works of other writers—to the effect that the rule of law against double possibilities is a rule still existing, prohibiting limitations of estates in such a way as that, although they may not offend against the rule of perpetuities, they are bad as being objectionable to the law. Then Lord *Kenyon*, referring to that point in *Hay* v. *Earl of Coventry*, says (1): "It is not necessary for me to say what effect that would have had in the present case, if that point"—that is, whether an estate for life could be given to unborn issue—"had remained undecided; because the law is now clearly settled that an estate for life may be limited to unborn issue, provided the devisor does not go farther and give an estate in succession to the children of such unborn issue." It is said that only meant that a limitation to the children of unborn issue generally, without any limit as to the time within which such children should be born, would offend against the rule of perpetuities; but in my opinion Lord *Kenyon* was referring to the old rule against double possibilities. It is clear, in my opinion, that the rule under which Mr. Justice *Kay* has decided this case is a rule which Judges treated as still subsisting long after the rule against perpetuities had been crystallised and laid down in definite and distinct terms.

Then, again, in *Monypenny* v. *Dering* (2) Lord *St. Leonards* says (3): "Then the rule of law forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child. With this rule I have never meant

(1) 3 T. R. 86. (2) 2 D. M. & G. 145. (3) 2 D. M. & G. 170.

to interfere, for it is too well settled to be broken in upon." According to the argument addressed to us on behalf of the Appellants that old rule has been superseded by the modern rule against perpetuities; but here we have Lord *St. Leonards* treating it as still subsisting in 1852.

Then we have besides, *Butler's* note to *Fearne* (1), in which he lays down what he takes to be the law—that there was no decision superseding the old rule. He says this: "The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue." He there quite treats it as the true rule still subsisting. And then we have a statement by *Burton*, in his Compendium (2), shewing that he did recognise clearly that the old rule was still subsisting. He says: "Life estates may by law be given in succession to any number of persons in existence, and ulterior estates in succession to their children yet unborn . . . . But no remainder can be given to the child of a person who is not in existence."

Therefore, although very ingenious and learned arguments have been addressed to us to shew that the old rule has been superseded and put an end to, it is, in my opinion, well established that the rule is still in existence.

There is a passage in Lord *St. Leonards'* judgment in *Cole* v. *Sewell* (3) in which he speaks of the rule as being obsolete, but he nowhere lays down that the rule is no longer existing. He only means that the rule is no longer necessary to be referred to because, through the introduction of shifting uses and executory devises, the law is now governed rather by the rule against perpetuities. When Mr. *Marten* referred us to *Sugden* on Powers, I referred him to the opinion expressed by the learned author, when sitting as Lord Chancellor, in *Monypenny* v. *Dering* (4), in the passage which I have read, and which shews he did not consider the old rule to have been abrogated. In my opinion the decision of Mr. Justice *Kay* is right.

(1) 10th Ed. vol. i. p. 565, n.
(2) 7th Ed. p. 255.
(3) 4 D. & War. 1, 32.
(4) 2 D. M. & G. 145, 170.

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LINDLEY, L.J.:—

I entertain no doubt myself that Mr. *Joshua Williams'* observations on this subject are correct from beginning to end, and I do not know that I could express my views better than he did. I do not know, any more than he seems to have done, the exact meaning of the old rule as to a possibility upon a possibility; and if anyone turns to the passage in *Coke* upon *Littleton* where it is discussed, I hope he will understand it better than I do. I confess I do not understand it now, and never did. But, at all events, it gave rise to the rule which everyone can understand, and which is expressed by *Butler* in the note to *Fearne* (1), where he says that "the cases of a possibility upon a possibility . . . . gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited, so as to confer an estate by purchase on that person's issue." That is intelligible; and there are other passages on pages 502 and 503 shewing this was the author's settled opinion.

I have always understood that to be the settled rule of law, and I am not aware of any decision or *dictum* which in any way impugns it. But it is said that the old rule became obsolete, or merged or confused in the more modern law of perpetuities. *Butler*, however, shews that this is a mistake. The rule against perpetuities was invented much later, on account of the law of shifting uses and executory devises. When shifting uses and executory devises were invented it became necessary to impose some limit upon them, and the doctrine of perpetuities has arisen from that necessity. The old rule against double possibilities is a rule that has not been abrogated, and it is founded on very good sense; because it is not desirable that land should be tied up to a greater extent than that allowed by the rule. So far from supporting ingenious devises for tying up land longer, the time has long gone by for that; and, as the law is against the Appellant's contention, in my opinion the appeal should be dismissed.

LOPES, L.J.:—

That there was an old rule that an estate could not be limited

(1) 10th Ed. vol. i. p. 565, n.

to an unborn child of an unborn person has been admitted, and, in fact, cannot be denied. It was an old rule originating out of the feudal system. But it is said that, although this old rule did once exist, it has been superseded by the rule against perpetuities. No direct authority has been cited for any such contention, nor can any such authority be found. Counsel have referred to certain *dicta* by text-writers of more or less doubtful import; but as early as the year 1789 that old rule was recognised as existing by Lord *Kenyon* in *Hay* v. *Earl of Coventry* (1); and again, in 1852, it was recognised, in *Monypenny* v. *Dering* (2), by so great an authority as Lord *St. Leonards*. Thus, in 1789 and 1852, that rule was recognised—that is to say, at a time when the rule against perpetuities was in existence.

I have no doubt, therefore, that these are two independent and co-existing rules. The rule against perpetuities originated and was rendered necessary on account of the introduction of executory devises and springing uses, against which the old rule would have been an insufficient protection.

I am clearly of opinion that the decision of Mr. Justice *Kay* was right, and that the appeal should be dismissed.

Solicitors: *Sanderson, Holland, & Adkin; Cowdell & Son; W. Montgomery White.*

(1) 3 T. R. 83.

(2) 2 D. M. & G. 145, 170.

G. I. F. C.

C. A.
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KAY, J.
Nov. 27.
C. A.
1890
Feb 15, 17.

In re RHODES.
RHODES *v.* RHODES.

[1885 R. 912.]

Person under Disability—Lunatic—Necessaries—Maintenance—Implied Contract—Implied Obligation—Debt—Right to recover against Estate of Lunatic not so found—Payments for her Maintenance in excess of her own Income—Necessaries suitable to position in life of Lunatic.

Whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property.

Accordingly an obligation may be implied on the part of a lunatic (whether so found or not) to repay a person who has supplied necessaries for him, when the necessaries supplied are suitable to the position in life of the lunatic. But the provision of money or necessaries must be made under circumstances which would justify the Court in implying the obligation, *i.e.*, with the intention on the part of the person making the provision to be repaid for so doing, and to constitute a debt against the lunatic's estate.

A lady of unsound mind who was never found a lunatic, and whose income was under £96 a year, was confined from 1855 down to her death in 1881 in a private lunatic asylum at a cost of £140 a year.

Her brother received the income of her property, and applied it in part payment of the £140, paying the deficiency out of his own pocket until his death in 1875. After his death his son, who was his executor, continued to receive and apply the lady's income in the same manner, and the deficiency was made good partly by him and partly by his brother and sisters. No claim was ever made by any of these persons against the lady's estate during her life, nor did any of them appear to have kept any account against her.

After her death:—

Held, by the Court of Appeal (affirming the decision of *Kay*, J.), that the deficiency was provided under circumstances from which no implied obligation could arise.

Carter v. *Beard* (1) doubted.

In re Weaver (2) explained.

ADJOURNED SUMMONS.

The action was for the administration of the estate of *Eliza Charlotte Rhodes*, who died on the 7th of July, 1881, a spinster and intestate, the Plaintiffs being some of her next of kin, and

(1) 10 Sim. 7. (2) 21 Ch. D. 615.

the Defendant, *Arthur Charles Rhodes*, her administrator. She was at her death, and had been for many years previously, a lunatic, though not so found by inquisition. From 1855 until her death she resided in a private lunatic asylum, where she had been placed by her brother *Charles Henry Rhodes*, who agreed with the proprietor of the asylum to pay him £140 a year for her maintenance.

It appeared that the intestate, who was in the social position of a lady, had some property of her own, consisting of personal estate yielding an income of under £96 a year. This income was received by her brother *C. H. Rhodes*, and applied by him towards payment of the £140 a year, he making up the deficiency out of his own pocket. This he did until his death in July, 1875, from which time his son and executor, the Defendant, *Arthur Charles Rhodes*, received the income of the intestate's estate, and continued to apply it towards payment of the £140 a year, the deficiency being made up by himself, partly out of his own pocket and partly by contributions from his brother and sisters.

The judgment for the administration of the estate of the intestate was pronounced on the 16th of January, 1886.

In carrying in his accounts under the judgment the Defendant *A. C. Rhodes* claimed to be allowed to retain out of the estate all sums paid by his father, and after the death of his father by himself, his brother and sisters, for the maintenance of the intestate beyond the actual income of her estate. The affidavits in support of the claim stated that the sums so paid in excess of the income of the intestate's estate were paid, not by way of gift, but with the intention that they should be ultimately repaid out of her estate; though it did not appear that any accounts of the expenditure were kept as against the intestate, or between the Defendant and his brother and sisters. In opposition to the claim evidence was adduced to shew that the amount usually paid at private lunatic asylums for the maintenance of patients in the position of the intestate was considerably less than £140 a year.

By his certificate dated the 22nd of July, 1889, the Chief Clerk found that there was "no debt due from the intestate's estate," and he disallowed all the extra payments. He held that

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as regards the Defendant *A. C. Rhodes* and his sisters, the extra payments were not made with the intention of making a gift of the same, but that there was no sufficient evidence to shew whether or not the extra payments by the Defendant's father and brother were made with that intention. He also found that the Defendant *A. C. Rhodes* had paid into Court or accounted for all the personal estate of the intestate.

The Defendant *A. C. Rhodes* then took out this summons to vary the Chief Clerk's certificate by allowing the claim. The summons was heard before Mr. Justice *Kay*, on the 27th of November, 1890.

Renshaw, Q.C., and *Phillpotts*, for the summons:—

Payments for the maintenance of a lunatic are debts payable out of the lunatic's estate. It was so laid down by Lord *Brougham* in *Howard* v. *Digby* (1).

[KAY, J.:—Have the cases gone so far as to make the same law apply to a lunatic as to an infant?]

Mellish, L.J., says, in *In re Gibson* (2): "A lunatic cannot contract for his maintenance, so whoever maintains him becomes a creditor by implied contract." In *In re Weaver* (3) *Jessel*, M.R., said that the question whether there was a legal debt had never been distinctly decided: but that the Court sitting in lunacy had jurisdiction to pay out of the lunatic's estate.

[KAY, J.:—But if the relatives choose to maintain the lunatic at a rate which exceeds his income, is that a necessary?]

There are necessaries in the case of a lunatic which would not be so in the case of a sane person. [They also referred to *Pope* on Lunacy (4), *In re Webster* (5), *In re Marman's Trusts* (6), *Wentworth* v. *Tubb* (7), *Carter* v. *Beard* (8), *Baxter* v. *Earl of Portsmouth* (9), *Nelson* v. *Duncombe* (10), *Brockwell* v. *Bullock* (11), *Thompson* v. *Cooper* (12), and *Manby* v. *Scott* (13).]

(1) 2 Cl. & F. 634, 663.
(2) Law Rep. 7 Ch. 52.
(3) 21 Ch. D. 615.
(4) Page 239.
(5) 27 Ch. D. 710.
(6) 8 Ch. D. 256.
(7) 1 Y. & C. Ch. 171; 6 Jur. 980.
(8) 10 Sim. 7.
(9) 5 B. & C. 170.
(10) 9 Beav. 211.
(11) 22 Q. B. D. 567.
(12) 1 Coll. 85.
(13) 1 Sid. 112.

[KAY, J., referred to *Vane* v. *Vane* (1), *Chester* v. *Rolfe* (2), and *In re Newbegin's Estate* (3).]

Millar, Q.C., and *Curtis Price*, for the Plaintiffs, were not called upon.

KAY, J.:—

In my opinion the Chief Clerk's certificate is perfectly right. This case raises a question of considerable interest and importance, namely, whether a man who supplies necessaries for a lunatic can recover the costs of these necessaries, either at law or in equity, as a creditor against the lunatic, on the ground of there being an implied contract on the part of the lunatic—a contract raised by implication of law—that there should be repayment of such costs. Now, I confess that, for my part, I do not feel the difficulty. Take the case of an infant. He cannot enter into any binding contract at all; and yet a binding contract is implied on the part of the infant whose necessaries are supplied, the contract being by implication of law. It is therefore not an answer to say that a lunatic cannot himself contract. An infant cannot contract so as to bind himself: yet the law does bind him by a contract for the supply of necessaries. But the question on that point has been considerably argued and discussed; and there is authority upon it which is of great weight.

Take first of all the case of *Howard* v. *Digby* (4). The lunatic had been so found by inquisition, and the claim was for necessaries supplied before the lunatic was so found. There Lord *Brougham*, referring to the practice in Chancery in lunacy matters, where the Master's report made allowances to persons for moneys paid for or necessaries supplied to the lunatic, said (5): "Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties, but because they are debts; because in the eye of that Court, be it a Court of law or a Court of equity, or the Chancellor sitting in lunacy, they are valid debts incurred by the insane person, and are discharged by the justice of the Court."

(1) 2 Ch. D. 124.
(2) 4 D. M. & G. 798.
(3) 36 Ch. D. 477.
(4) 2 Cl. & F. 634.
(5) 2 Cl. & F. 663.

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The point came before Vice-Chancellor *Knight Bruce*, in the case of *Wentworth* v. *Tubb* (1), where the bill was filed by the administrator and creditor of the lunatic against the heir-at-law of the lunatic, who was also a lunatic, and his committee, praying payment out of a certain real estate which had descended from the deceased to the defendant, the heir-at-law, there being no personal assets. The claim was founded on a report made by the Master in the lunacy of the deceased, by which he found that the deceased had been maintained and provided with necessaries at the sole expense of the plaintiff before and after the issue of the Commission in Lunacy, and down to the death of the lunatic. Vice-Chancellor *Knight Bruce* said: "The debt, if it is one, became due from the lunatic by operation of law; or, in other words, upon a contract raised by implication of law. If I were satisfied that there could be no such contract—that there could be no liability so raised—it would be my duty to dismiss the bill; but I am not so satisfied." He therefore directed an inquiry as to the existence of the debt claimed by the plaintiff. The case then came on an appeal by the defendants (2), before Lord Chancellor *Lyndhurst*, who said, during the argument: "If a party applies money for the benefit of a lunatic with his consent, and without fraud, it is a debt which can be enforced against the lunatic. The law constitutes it a debt for the benefit of the lunatic, and if he dies it is payable out of his estate. The rule applies only to necessaries, and there are several decisions to that effect, which have always been acquiesced in." Now, with regard to the words "with his consent," they can hardly have been used by the Lord Chancellor, because the consent of a lunatic would have been a nullity. The Lord Chancellor, in giving judgment, is also reported to have said: "Where necessaries are furnished to a lunatic, and no fraud or imposition is practised upon him by the party furnishing them, the lunatic is bound to pay for them, as being a debt due from him to such party; and if a debt, upon his decease his estate is chargeable with it." He then reads the observation of Lord *Brougham*, which I have read, as to allowances for necessaries being debts, and says: "He (Lord *Brougham*) therefore considers

(1) 1 Y. & C. Ch. 171, 173. (2) 6 Jur. 980.

them as debts due from the lunatic, and if debts they are a charge upon his estate," and he dismissed the appeal.

In the case of *Williams* v. *Wentworth* (1) the matter came before Lord *Langdale*, M.R., who said: "It was argued in this case, that however beneficial to the lunatic, the expenditure may have been, yet, as the lunatic was incapable of contracting, no debt could be constituted; but I am of opinion, that in the case of money expended for the necessary protection of the person and estate of the lunatic, the law will raise an implied contract, and give a valid demand or debt, against the lunatic or his estate, and that under the circumstances of this case, a debt was constituted, and that payment of it may be obtained out of the real estate, if the personal estate be insufficient. Any other conclusion would, as it appears to me, be extremely dangerous, as well as contrary to the principles upon which several cases have been decided. That which is necessary for the protection of the person and estate of the lunatic, may well be subject to question and consideration; but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished, in principle, from a demand arising in respect of the supply of food and clothing. A debt is constituted by reason of a contract, which, in such cases, the law will supply, and it rests, as I conceive, upon a far better foundation than the rule which has sometimes been referred to—that a man shall not be allowed to stultify himself."

Again, a similar point came before Vice-Chancellor *Knight Bruce* in *Wentworth* v. *Tubb* (2), when the costs of an unsuccessful traverse of an inquisition of lunacy were allowed out of the testator's estate. The report notes the affirmation of the decision on the other point in the case by the Lord Chancellor. The Vice-Chancellor says: "I apprehend the law to be, that if a man is alleged to be a lunatic, whether truly or not, he may employ (as far as he can be said to exercise volition on the subject) a solicitor, not only to resist the commission, but afterwards, for the purpose of traversing it, and that, although the proceedings fail, the lunatic's estate is liable for the costs, subject to this—that if anything fraudulent or unfair—or, perhaps I may go as

(1) 5 Beav. 325, 329. (2) 2 Y. & C. Ch. 537.

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far as to say frivolous or litigious—appears to have taken place on the part of the solicitor, the Court may say that no debt arises.'

Then, in a later case of *Nelson* v. *Duncombe* (1), Lord *Langdale* says (2): "The objection is made to the jurisdiction. It is said that, as no lunacy has been found, there can be no implied contract, and in the absence of contract, the Court has no jurisdiction to adjudicate upon the claim. It is, I think, true, that in all cases of implied contract which have been decided, there has been a lunacy actually found but it has not been determined, that this Court will not take notice of what is done, in respect of the property of persons lunatic though not so found, or that a contract may not be implied for the supply of necessaries to such persons."

Then there is the case of *In re Gibson* (3), in which Lord Justice *Mellish* says in the course of the argument: "A lunatic cannot contract for his maintenance, so whoever maintains him becomes a creditor by implied contract."

I have read a considerable body of authority in support of that proposition, and among others the authority of Lord *Brougham* in the House of Lords, and the well-considered opinion of Lord *Lyndhurst*, sitting as Lord Chancellor, besides the authority of Vice-Chancellor *Knight Bruce* and Lord *Langdale*, both twice repeated. But in the case of *In re Weaver* (4) the late Master of the Rolls, sitting in the Court of Appeal, commenting on that statement of Lord Justice *Mellish*, which was read in argument by the counsel for the Respondents, says (5): "That is only an interlocutory observation. It is difficult to see how there can be an implied contract with a lunatic, if he is incompetent to make an express contract. It is not always safe to report interlocutory observations of Judges, they are very liable to be misunderstood." If I may respectfully say so, the reporter ought to have remembered that before he reported that interlocutory observation of the late Master of the Rolls. In giving judgment the Master of the Rolls said: "It is not necessary to decide the question

(1) 9 Beav. 211.
(2) Ibid. 231.
(3) Law Rep. 7 Ch. 52.
(4) 21 Ch. D. 615.
(5) 21 Ch. D. 619.

whether there could be a legal debt in this case; for myself, I reserve my opinion on that point, which appears never yet to have been distinctly decided." Lord Justice *Brett* says (1): "A question has been flushed, if I may use the word, in this case which it is not necessary to decide, namely, whether if a person supplies necessaries to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied. I give no opinion upon that point. It has not been fully argued to-day, and it appears to me to involve a very difficult point of law, which I do not think has ever been settled by authority. For my own part I should doubt whether in favour of a person who knows of the lunacy you can imply a contract to pay for a supply of necessaries to a lunatic."

But in a late case of *Brockwell* v. *Bullock* (2) a medical man, not a physician, brought an action in the County Court against a lunatic and his committee, in respect of services rendered to the lunatic by giving evidence on his behalf in an inquiry under the *Lunacy Regulation Acts*, and on which inquiry he had been found a lunatic, but the Plaintiff was non-suited on the ground that he could not recover such charges without an order under sect. 11 of the *Lunacy Regulation Act*, 1862. He then appealed to the Queen's Bench Division, but the appeal was dismissed. Then the case came before the Court of Appeal, and Lord *Esher*, M.R., held that sect. 11 did not take away any right of action which would otherwise have existed. In the course of his judgment, he says this: "Under these circumstances, the only question for us seems to be whether, assuming that the defendant was not a lunatic at the time of the plaintiff's employment, or that such employment of the plaintiff was a necessary, the action might be maintained. It seems to me that, before the statute to which we have been referred, the action might in either of these cases have been maintainable."

That is a distinct authority that an action would lie against the lunatic and his committee for necessaries supplied to the lunatic. Then later on Lord *Esher* says: "If it be shewn that the defendant *Bullock* was a lunatic when the plaintiff was employed, then I think that in order to succeed the plaintiff must

(1) 21 Ch. D. 620. (2) 22 Q. B. D. 567, 571, 572.

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shew that his employment was a necessary, a matter which may give rise to difficult questions."

I can only say of these authorities—and no others have been brought to my attention—that the large preponderance is in favour of the principle that any one who supplies necessaries for a lunatic may maintain an action, even at law, for the necessaries; and that he may so maintain the action upon the ground of an implied contract with the lunatic—a contract which the law will imply notwithstanding the lunacy.

But in the present case the real question is, are these necessaries? What happened was this. This lady was a lunatic; she had certain property of her own which produced a small income, and her brother placed her in an asylum at £140 a year. She might have been placed there for very much less than that, but her brother thought it right to pay the larger sum, and after the death of her brother, his son, with other members of the family, continued the maintenance of the lunatic at this large sum. But now a claim is made before me that the extra expense was a necessary for the lunatic. It was very generous of her brother to place her in this asylum, and, had he lived, he might very likely have continued to maintain her there. But that the extra expense was a necessary, is not proved at all to my satisfaction.

Another point is this; the allowance made by the brother and afterwards by his son and the other members of the family, seems clearly to have been an allowance which they never expected to be repaid. There is no evidence which satisfies me that any of these parties expected any repayment. How far a feeling of kindliness towards their relative may have actuated them I do not know. But there is nothing to shew that they had the smallest expectation of being repaid or of making this a debt against the estate of the lunatic. This application must be refused with costs.

G. I. F. C.

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From this decision the Defendant appealed. The appeal was heard on the 15th and 17th of February, 1890.

Renshaw, Q.C., and *Phillpotts*, for the Appellant:—

It is clear upon the authorities that a person who supplies

necessaries to a lunatic becomes a creditor by implied contract: *Howard* v. *Digby* (1); *In re Weaver* (2); *In re Gibson* (3); *Wentworth* v. *Tubb* (4); *Williams* v. *Wentworth* (5); *Nelson* v. *Duncombe* (6); *Brockwell* v. *Bullock* (7). We have a good right of retainer for the debt we claim: *Thompson* v. *Cooper* (8); *Stahlschmidt* v. *Lett* (9).

Millar, Q.C., and *Curtis Price*, for the Respondents:—

The Chief Clerk has found that there were no debts due by the estate of the deceased lady, and there has been no application to vary this finding; so the sum claimed cannot be treated as a debt. But however this may be, the authorities relied upon on behalf of the Appellant do not govern the present case, because they all fall within one or other of two categories. They are cases in which either (1) the person against whose estate the claim is made has been actually found a lunatic, or (2) the payment has been made by some one who was in a fiduciary position towards the person for whose benefit he made it. The payments here, however, were in the nature of bounties from relatives, and *Carter* v. *Beard* (10) is on all fours. There it was held that a relative (in that case the stepfather) of a lunatic not so found, who had expended more than the amount of income of the lunatic in maintaining him, and had also paid his funeral expenses, was not entitled under 3 & 4 Will. 4, c. 104, to be paid either the surplus expenditure or the amount of the funeral expenses out of the lunatic's estate. The ground of that decision was, as to the surplus expenditure for maintenance, that it was a bounty on the part of the stepfather, and not a debt contracted by the lunatic, who was in a situation which incapacitated him from contracting a debt.

[COTTON, L.J.:—I have a doubt about the law laid down in that case.

LOPES, L.J.:—So have I, a great doubt. But I do not think

(1) 2 Cl. & F. 634, 663.
(2) 21 Ch. D. 615, 620.
(3) Law Rep. 7 Ch. 52.
(4) 1 Y. & C. Ch. 171; 6 Jur. 980.
(5) 5 Beav. 325.
(6) 9 Beav. 211.
(7) 22 Q. B. D. 567.
(8) 1 Coll. 85.
(9) 1 Sm. & Giff. 415.
(10) 10 Sim. 7.

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that unless the intention of the party making the payment was that it should constitute a debt, any obligation could be implied against a person under disability.]

Even if a debt was contemplated the payment must have been for necessaries, and these payments were not for necessaries. There is no evidence whatever that this surplus expenditure was necessary. The lunatic might have been maintained at an expense which her own income would have met. Again, the Appellant never kept any account. At all events, nothing is forthcoming against this lady, and as to his brother and sisters, the Appellant has no interest in complaining that their contributions have not been repaid.

Phillpotts, in reply upon the question whether the payments were for "necessaries," upon which alone he was called upon to reply:—

In the case of a lunatic, maintenance and care are *ex necessitate rei* necessaries. All that the other side can say is that this lady might have been maintained more cheaply. But what is necessary must be judged by the position of life of the lunatic, and the question is whether the expenditure was suitable thereto, and not whether a bare subsistence could have been procured more cheaply.

COTTON, L.J.:—

This is an appeal against a decision of Mr. Justice *Kay*, refusing to allow a claim made by the Appellant on behalf of himself and his brother and sisters, and also as the legal personal representative of his father, for several sums expended in support of a lady who was of unsound mind in excess of what was provided by the income of her own property.

The case raises several questions, one of which is of considerable importance; and, although in the view which we take, that question is not necessary to the decision of the case, yet, as it has been fully argued, we think we ought to express our opinion upon it. That question is, whether there can be an implied contract on the part of a lunatic not so found by inquisition to

repay out of her property sums expended for necessaries supplied to her. Now the term "implied contract" is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such a person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries. I think that the expression "implied contract" is erroneous and very unfortunate. In one case which was before the Court of Appeal, *In re Weaver* (1), the question whether there could be what has been called an implied contract by a lunatic, was left undecided by the Court, and one of the Judges said that it was difficult to see how there could be an implied contract on the part of a lunatic if he was himself incompetent to make an express contract.

But we all agree with the view that I have thus expressed in order to prevent any doubt from arising in consequence of our having declined to settle the question in the case to which I have alluded.

But, then, although there may be an implied obligation on the part of the lunatic, the necessaries must be supplied under circumstances which would justify the Court in implying an obligation to repay the money spent upon them.

I have no difficulty as to the question of the expenditure being for necessaries, for the law is well established that when the necessaries supplied are suitable to the position in life of the lunatic an implied obligation to pay for them out of his property will arise. But then the provision of money or necessaries must be made under circumstances which would justify the Court in implying an obligation. Here the lady, who was never found a lunatic, was confined in a private asylum, in 1855, at a cost of £140 a year, and her brother from that time down to the time of his death supplied her with the sums required to make good

(1) 21 Ch. D. 615.

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the necessaries for her maintenance. After his death the Appellant, who was his father's executor, and his brother and sisters, contributed towards the expense of her maintenance. I do not so much rely on the circumstance that there is no evidence to shew that the father intended this to be a debt. But we must look to the facts of the case in order to see whether the payments for the lunatic were made with the intention of constituting thereby a debt against the lunatic's estate. It is said that the father and the brother and sisters always intended to be recouped. And, no doubt, at the time the payments were made, the persons making them were the next of kin, or some of the next of kin, of the lady, and it is very probable that, although they did it as relations, they, no doubt, in making such payments did look to the fact that, as next of kin, they would ultimately come into the lunatic's property. No books have been produced, but we must assume that the Appellant kept no account between himself and his brother and sisters. And the observation occurs that, if it had been intended by the Appellant that these payments should constitute an obligation in his favour, as against the estate of the lunatic, he would not have asked his brother and sisters to contribute, but would have paid the money himself. The certificate has, no doubt, found that the sisters had no intention of making a gift, and this in favour of the Appellant. But although they had no particular intention of making a gift, they contributed the money; and, if they intended to be repaid, it is very strange that they make no claim on their own behalf, but leave their brother to make it for them. In my opinion, the true effect of the evidence is that all these persons—the Appellant, and his brother and sisters, and the father—did provide this money under circumstances from which no implied obligation could arise.

LINDLEY, L.J.:—

The question we have to decide is whether a sum of £1100 is payable as a debt out of the assets of the deceased lady. The claim is made on the ground that the money has been properly expended for necessaries. I think that the facts are in favour of

the money having been reasonably and properly expended for necessaries. Against that it is said that the lady might have been supported at an expense which her own income would have been sufficient to meet; but, as in the case of a claim made for necessaries against the estate of an infant, the claimant is not always bound to shew that he sent the infant to the cheapest school that could be found, so, in this case, the fact that some cheaper place of residence might possibly have been found for this lady is not necessarily an answer to this claim, assuming that it can be made. The question whether an implied obligation arises in favour of a person who supplies a lunatic with necessaries is a question of law, and in *In re Weaver* (1) a doubt was expressed whether there is any obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law, owing to which the expression "implied contract" has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu.*

But that a lunatic's estate may be made liable for necessaries was treated as settled as long ago as *Manby* v. *Scott* (2), where three learned Judges, after holding that an infant might be bound for necessaries provided for him, said, "and what has been said of an infant is applicable to an idiot in case of housekeeping."

I do not doubt that the cost of necessaries can be recovered against a lunatic's estate in a proper case.

Then we come to the question of fact. Now, in order to raise an obligation to repay, the money must have been expended with the intention on the part of the person providing it that it should be repaid. I think that that intention is not only not proved, but is expressly negatived in the present case. I do not believe that the brother ever intended to constitute himself a creditor of his sister so as to render her estate liable to repay

(1) 21 Ch. D 615. (2) 1 Sid. 112.

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him. He was a kind and affectionate brother; but if he had had any such an intention, being a man of business, he would naturally have kept some kind of account between himself and his sister. There is no real ground for saying that he ever dreamt of repayment. Since his death his children maintained this lady by contribution, and, while there is no direct evidence to shew that the money contributed was a gift, there is still less evidence to shew any intention to be repaid.

Upon the facts, then, I come to the conclusion that the constitution of a debt between themselves and the lunatic was the last thing that the persons who made the payments contemplated.

LOPES, L.J.:—

If a person finds necessaries for a lunatic, and intends to be repaid for so doing, and to constitute a debt against the lunatic, I do not doubt that the law implies an obligation on the part of the lunatic's estate to repay the amount spent on such necessaries. It seems to me strange that the law to this effect could be doubted.

I have known several cases in the Queen's Bench Division of this kind. Action brought for goods sold and delivered. Plea, insanity. Replication, necessaries. And I never heard any doubt expressed that it was a perfectly good replication. The question here is whether the payments in question were bounteous or constituted a debt; and I come to the conclusion that they were bounteous gifts, and for two reasons. First, during twenty-five years the brother never made any claim against the estate of the lunatic; nor did he, although he was a man of business, ever keep any account against this lady. Then, after the death of the brother, the son became his executor, and what he does is to seek contributions from the other relatives of this lady. Now, I think that if he had intended to constitute himself a creditor of the lunatic's estate, he would not have taken that course. He would have made the entire payments himself. Then comes the question whether these payments can be considered as being for necessaries. I should not myself have felt any difficulty as to that, because necessaries have to be determined according to the

circumstances of each particular case, and things may well be necessaries in one case which would not be so in another. The question what are necessaries must always be considered with reference to the reasonable requirements of the lunatic, having regard to the station in life and means of the person in question.

The appeal fails, and must be dismissed with costs.

Solicitors: *Spencer, Gibson & Co.*; *Grover & Humphreys.*

W. W. K.

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Nov 11, 12, 13, 18, 19, 20, 21, 25; *Dec.* 3.

BOURKE *v.* DAVIS.

[1888 B. 4596.]
[1888 B. 4965.]

River—Highway—Public right of User for Boating—Right of Way or of Recreation—Cul-de-sac—User, whether Permissive or of Right—Affidavits—Duty of Commissioner.

The river *M.* was a non-tidal tributary of the *Thames*. The flow of the *M.* on its course to the *Thames* was obstructed by a mill-dam, and in order to bring boats from the *Thames* on to the part of the *M.* above the dam, it was necessary to take them out of the water and carry them over private land. The *M.* above the dam flowed under bridges, first at *C.*, and then at *E.*; and the part of the river between the bridge at *C.* and the dam was not a way from one public place to another, had never been used as a waterway except for purposes of pleasure and recreation, and its depth and capacity for boating traffic depended on the existence of the dam.

The Plaintiff, who was the owner of an estate lying on both sides of this part of the *M.*, obstructed the waterway of the river where it flowed through his land with posts and chains. The Defendant, who was not a riparian proprietor, but who had for eight years previously kept boats on a piece of land not belonging to him and let them out for hire, pulled down the obstruction, and justified this act on the ground that this part of the *M.* was a highway. The Plaintiff brought this action for an injunction to prevent his obstruction being interfered with, and the Defendant counter-claimed for an injunction to restrain any hindrance to the passage of his boats.

From the evidence it appeared that there had been no maintenance of the waterway by any person, with the exception of dredging by the owner of the mill, that as far back as living memory went there had been boating upon this part of the river by the riparian proprietors and their friends, that subsequently, by degrees and at first quite secretly, a few persons living on the bank began to take remuneration for lending their boats, not making any charge, but receiving what the borrower chose to give, that thenceforth the growing practice of boating for pleasure, including fishing, had not been effectively interfered with until the Plaintiff put his obstruction across the stream, though notices had been put up near the river warning persons against trespassing in boats for fishing or otherwise; but there was no evidence which could establish any public right of fishing:—

Held, that the claim of the Defendant must be treated as if it were a claim to establish a right of highway on dry land; that, so considered, the claim in effect was to impose on land a new servitude, or establish a highway on conditions which were inconsistent with a right of that kind; that the true inference from the evidence was that the use made of this part of the river had been permissive and not as of right; but that even if the

boating of the public was not permissive the Defendant had not proved that this part of the river was a highway; that the Plaintiff was therefore entitled to maintain his obstruction as against the Defendant, and that an injunction must be granted to restrain the Defendant from interfering with it.

A right of recreation by custom upon the land of another cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district.

The riparian owners might possibly be able to establish a private right of way, or a right of boating for recreation for themselves and their friends by custom, but the existence of such a right or custom, if established, would not entitle the public to boat on the river or support the claim that it was a highway.

Quære, whether a lake in private grounds, touched at one point only by a public road, can be subjected to a right which will make it a highway by persons launching boats from the road on it for pleasure.

Marshall v. *Ullswater Steam Navigation Company* (1) considered.

Consideration of the circumstances under which a *cul-de-sac* may be a highway.

Observations as to the duty of commissioners to administer oaths where a witness is swearing to the contents of an affidavit.

TRIAL of actions with witnesses.

The Plaintiff was the owner of an estate on both sides of the river *Mole*, which is a tributary of the *Thames*. The Defendant was not a riparian proprietor, but had for eight years previously to the commencement of the action kept boats on a piece of land adjoining the river *Mole*, and let them out for hire.

The Plaintiff recently obstructed the waterway of the river *Mole*, where it flowed through his land, by posts and chains. The Defendant broke down the obstruction, and the Plaintiff brought an action for an injunction to restrain the Defendant from interfering with the obstruction.

The Defendant by his defence alleged that the part of the river *Mole* between *Cobham Bridge* (which was situated higher up the river than the Plaintiff's land) and a mill dam (which lay below the Plaintiff's land) was a public highway, and he counter-claimed for an injunction to restrain the Plaintiff from hindering the passage of his boats.

The Plaintiff originally claimed to be entitled to the bed of the river *Mole*, where his land adjoined it on both sides, and to

(1) Law Rep. 7 Q. B. 166.

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one-half of the bed of the river where his land adjoined it on one side only. Subsequently to the commencement of the action it was ascertained that the soil and bed of the river between *Cobham Bridge* and the mill dam were vested in persons who had obtained them by grant from the Crown in 1820. The Plaintiff purchased the rights of these persons, and at the hearing sought to rely upon the new title thus acquired, and applied for leave to issue a new writ. This application was opposed on behalf of the Defendant; but after argument Mr. Justice *Kay*, under the circumstances, expressed his intention of acceding to it, leaving it for the Defendant to say whether he would require any further pleadings or not. His Lordship at the same time intimated his willingness to proceed with the hearing. Adjournment was thereupon waived on the part of the Defendant, the two actions were consolidated, and the hearing was proceeded with, reserving the question of costs.

The further facts of the case, and the nature of the evidence given by the witnesses, sufficiently appear from the judgment.

Rigby, Q.C., *Renshaw*, Q.C., and *Levett*, for the Plaintiff:—

The real question to be determined is whether there exists a public right of boating on the portion of the river *Mole* between *Cobham Bridge* and the dam at the paper mill. The river is neither tidal nor navigable. By the Act 16 & 17 Car. 2, No. 24, dealing with this and other rivers for the purpose of making them navigable, certain undertakers had the right of making this river navigable, but nothing was ever done under that Act, and the rights of the owners of the soil are not affected by it: *Hargreaves* v. *Diddams* (1). It is true that a river not navigable in the strict sense of that word may be "boatable"—to use a convenient, though not a legal, form of expression—and the question is whether this river is "boatable." The riparian owners may have private rights of navigating beyond their boundaries; such a user has in this case in fact existed by the consensus of the riparian owners amongst themselves; but there has been no user by the public except by permission or sufferance of the riparian owners.

(1) Law Rep. 10 Q. B. 582.

Harris, Q.C., *Naismith*, Q.C., and *Oswald*, for the Defendant:—

We claim to have proved a right in the public to use this portion of the river *Mole* with boats, punts, and other light craft. There is no technical meaning in the term "navigable"; the right of navigation is simply a right of way: *Orr-Ewing* v. *Colquhoun* (1). It may be admitted that a right of way could not be established if it were not possible to get on the river without trespassing on private land, but that is not the case. The river is proved to be tidal. The distance to which the tide flows up the river is immaterial on the question whether it is tidal. The river is not the less navigable because in particular places it may not be so; there is no river which is navigable from its source to its mouth. The Act of Car. 2 recognises the river as navigable; under that Act compensation was to be given for cuttings, &c., but not for rights of way, water, or fishing.

[KAY, J.:—Must I not take it on the evidence that but for the dam at the paper mills there would not be water enough in the river for boating?]

Certainly not. If there were no weir above *Cobham Bridge* the country would be inundated.

The *Mole* is a King's river. It was one of the ancient rivers which were placed "in defence" by the King previously to Magna Charta. Being a King's river it must necessarily be a King's highway: Lord *Hale de Jure Maris*, *Hargrave's* Tracts (2). All rivers, the soil of which belongs to the Crown, if navigable, are public, and the public have a right to navigate; nor can the Crown prevent them from so doing: *Miles* v. *Rose* (3); *Murphy* v. *Ryan* (4); *Blundell* v. *Catterall* (5); *Mayor of Colchester* v. *Brooke* (6): *Phear* on Rights of Water (7). The Plaintiff has given no evidence shewing any right to obstruct.

The evidence is sufficient to prove a dedication of the river to the public by the owners of the soil.

[KAY, J.:—There must be an intention to dedicate.]

(1) 2 App. Cas. 839.
(2) Ch. iii. p. 8.
(3) 5 Taunt. 705; 1 Marshall, 313.
(4) I. R. 2 C. L. 143.
(5) 5 B. & Al. 268.
(6) 7 Q. B. 339.
(7) Page 91.

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The intention is inferred from the acts of user. It is sufficient if the servient owner has a reasonable opportunity of becoming acquainted with and is able to resist the user: see *Mann* v. *Brodie* (1). In *Miles* v. *Rose* (2) it was said that even as to pleasure boats, if a person wishes to protect his exclusive possession, he must keep up the evidence of his right by guarding it against intruders.

In *Rex* v. *Barr* (3) dedication of a way over a close was presumed although the landlord was never in actual possession himself nor proved to have been near the spot. In *Reg.* v. *Petrie* (4) it was held that "the onus lies on the person who seeks to deny the inference" of dedication from user "to shew negatively that that dedication was impossible, and that no one capable of dedicating existed"; and see *Goddard* on Easements (5).

Further, it has been shewn that the riparian owners have a right to go upon all parts of the river; the public must, in respect of the roads and other places of public access to the river, be in the same position and have the same rights.

[KAY, J.:—The public are not riparian owners in respect of a road.]

The river has always been open to the public. The evidence has abundantly established a user long continued and as of right. The Plaintiff has taken no steps to intercept that user, and make it permissive. We ask the Court to continue to us that user.

[KAY, J.:—Is there any case in which persons have established a right to boat on a lake wholly on private land with a road touching the lake at one point only?]

In *Marshall* v. *Ulleswater Steam Navigation Company* (6) there was an inland lake, landlocked, and the public established a right of navigation over it. It is clear that a *cul-de-sac* may be a highway: *Young* v. *Cuthbertson* (7).

(1) 10 App. Cas. 378, 386.
(2) 5 Taunt. 705; 1 Marshall, 313.
(3) 4 Camp. 16.
(4) 4 E. & B. 737, 749.
(5) 3rd ed. p. 355.
(6) Law Rep. 7 Q. B. 166.
(7) 1 Macq. 455.

[KAY, J., referred to *Rugby Charity* v. *Merryweather* (1) in a note to *Daniel* v. *North* (2).]

After a sufficient time a dedication to the public is presumed. The character of the user does not prevent the presumption. Thus, there may be a dedication subject to the right of ploughing up: *Mercer* v. *Woodgate* (3); the law is perfectly consistent. No authority can be cited against the possibility of the existence of such a right as that which the Defendant claims. If such a right can exist, the evidence given in the present case is abundantly sufficient to prove its existence; from the nature of the case no more cogent evidence could be expected. A right may be acquired to navigate any part of a river; it is not necessary that the river should be open from end to end; nor that it should be navigable at all times, or at any particular time, of the year; if it is navigable at any time and the public have acquired a right, it is immaterial for how long a period in the year it is navigable. Whether as against the landowners, or against the Crown, there is proved an absolute case of user to which there is no answer.

Rigby, in reply:—

There is no evidence of a public right of way. Such a right must be from one public place to another. In *Macpherson* v. *Scottish Rights of Way and Recreation Society* (4) there was a definite track from one public place to another: see the observations of Lord *Watson* (5), to the effect that the question was whether the use was had in the exercise and assertion of a public right, or must be ascribed to the tolerance of successive proprietors. The case is not analogous to a right of way over a private park from one gate in a high road to another, but rather to one where the owner of a park has permitted the public to come in and wander about, or go to a particular place to enjoy the prospect, or the like. In such a case it would be obvious that the user was permissive, because any one enjoying such user would always be on another's private land, and using it by his sufferance, and it could not be supposed that the owner

(1) 11 East, 375, n.
(2) 11 East, 372.
(3) Law Rep. 5 Q. B. 26.
(4) 13 App. Cas. 744.
(5) Page 751.

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intended to make it impossible for himself to use the land for building purposes, and there being no defined path there could be no right of way: *Dyce* v. *Hay* (1); *Young* v. *Cuthbertson* (2); *Campbell* v. *Lang* (3). No doubt a *cul-de-sac* may, in certain circumstances, be a public way, as, for instance, if there is at one end a clear opening into a public thoroughfare, so that the public can freely pass and repass; in that case the *cul-de-sac* may be regarded as part of the public thoroughfare. No user here has been proved except for purposes of recreation: *Dyce* v. *Hay* (4). A mere right of recreation is not the subject of dedication. It can only arise by custom or express grant. It is a right carefully limited and restricted, and it cannot exist in the public, though it may in the inhabitants of a particular vill or place. Since 1820, until recently the bed of the river has been in settlement, and there never has been an owner in fee simple who could have dedicated. According to English law (which differs in this respect from the Scotch law) there can be no dedication against the intention of the landowner. It is much more difficult to infer a dedication in this case than in the case of a road. There has been no public letting out of boats on this river; the letting has always been *sub rosâ*; in part *clam*, in part *precario*. It is suggested that because the bed of the river was in the Crown, the river must be in an exceptional position, and that the right of fishery is in the public unless the Crown has granted a several fishery; but there has been no evidence which could establish that there has ever been fishing on the river as of right; every instance given has been permissive.

[KAY, J.:—According to your evidence the riparian owners have been in the habit of using the river in boats. If the bed of the river was in the Crown, would they not acquire a right against the Crown?]

They would acquire a series of private rights.

[KAY, J.:—That might be by consensus of the riparian owners if the bed of the river were in them. But if the bed were in the Crown, what right in law can they establish except a public right?]

(1) 1 Macq. 305, 312.
(2) Ibid. 455.
(3) 1 Macq. 451.
(4) Ibid. 305.

A right appurtenant to their tenements. It cannot make any difference in law as to the right acquired, whether the tenement of the riparian owner is of a greater or less extent, whether it includes or does not include a portion of the bed of the river; in every case the right commences at the boundary of the tenement. We are not concerned to establish that the riparian owners have acquired a legal right—it may be a right of recreation; it is sufficient to shew that whether the bed of the river be in the Crown or not, the right has been acquired by private user by members of a class each of whom acquires for himself as owner of a particular tenement.

[He referred also to *Duke of Devonshire* v. *Pattinson* (1).]

1889. Dec. 3. KAY, J.:—

The river *Mole* runs under *Cobham Bridge*, and some miles further on under *Esher Bridge*, into the *Thames* near *Hampton Court*. It is not tidal. Extraordinary high tides have been known to affect the *Thames* as far as *Hampton Court*, but the highest known tide would not, as the levels shew, if there were no obstruction, raise the water of the *Mole* much beyond its mouth, and not nearly so far as *Esher Bridge*. But there are obstructions. Some distance from the *Thames* the *Mole* divides into two streams, one of which takes the name of the *Ember*. Across the *Mole*, at a point where these two streams again approach one another, about 800 yards from the *Thames*, is a mill which completely stops the waterway. Higher up is another obstruction, and again a little below *Esher Bridge* the river is dammed by some mills which formerly were paper mills, which were burnt about 1853, and remained unoccupied for many years until they were used for the manufacture of linoleum. It is proved that if the sluices at these mills were drawn the river between *Esher* and *Cobham Bridges* could not be used for boating except in times of flood. It would be merely a string of pools united by a shallow stream. But thus dammed up there is water enough to float canoes, punts, and skiffs nearly up to *Cobham Bridge*. For 100 yards or thereabouts below that bridge, however, the river is very shallow, and

(1) 20 Q. B. D. 263, 271.

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occasionally it is difficult to get up further. Above *Cobham Bridge*, I understand, the river is dammed up again. This waterway has not been used for purposes of commerce. Once when a railway bridge was being built some bricks were brought down over part of it, and on another occasion some poles cut by the side of the stream were floated down on a punt; but except these instances there has been no traffic on it other than boats for pleasure, with occasional fishing. There is no access for boats from the *Thames* without taking them out of the water and carrying them over the land of private persons past the mill dams I have mentioned. An attempt has been made to prove a right of access for boats from the road over *Esher Bridge* by the side of that bridge. That attempt has not been successful. I am satisfied that there is no public right of access for boats from the road to the river at that point. At the paper mills lower down a road leads under a railway arch and thence parallel with the railway on the *Esher* side of the river to the paper mills. At this point boats have occasionally been brought on trolleys and launched into the mill pool. It is disputed whether this road is public for vehicles. A footpath crosses the river, but the cart road stops at the mill. There is no evidence of any wayfarer having used the river as a continuation of this road. Higher up the public highway approaches the river at two points. One is where the Defendant keeps some boats. The road is separated from the river by posts and rails, having at one end a space two feet wide through which a man can pass, but boats can only be got from the road to the river by passing them over or under the rails, and across a narrow strip of land between the rails and the river. Again, at a place called the *Shrimper*, the road is railed off in like manner, leaving, however, a space through which cattle can be taken to the river to water. This place, however, does not seem to have been used much, if at all, as an access for boats. There is a lane running down to the river called *Water Lane*, which it is suggested led to a ford in former times before a bridge was built at *Esher*. There is no evidence that any one ever brought a boat by this road and put it on the river at this place. A great effort has been made to prove that there was a public access to the riverside at *Cobham Bridge*. This has entirely failed. The road to that

bridge cannot be reached from the river without crossing the land of private owners, over which there is no right of way.

The result is that the River *Mole* from *Cobham Bridge* through *Esher Bridge* to the dam at the paper mill is a natural stream, whose depth, if the dam were removed, would not be sufficient even for a canoe to pass between the two bridges. Its depth is entirely artificial, and upon this depends its capacity for boating traffic. It is not, and never was, a way from *Esher* to *Cobham*, or from any one public place to another. It is, in fact, a long pond approachable by a high road at one or more points along its course. It has never been used as a waterway, except for purposes of pleasure and recreation.

The Defendant has let boats for hire for about eight years. He is not a riparian proprietor. The house he occupies is at some little distance from the river. He keeps his boats by the river at the place I have described, which does not belong to him. He has no right of occupation there. The Plaintiff is owner of an estate which lies on both sides of the river, and for some distance includes the opposite banks. He has recently stopped the waterway with posts and chains. These the Defendant broke down. Hence arose this litigation. The Plaintiff sues to prevent his obstruction being interfered with. The Defendant counterclaims for an injunction to restrain any hindrance to the passage of his boats. Originally the Plaintiff sued as riparian proprietor, claiming that the bed of the river where his land came down to it on both sides, and half the bed where only on one side, was his property. At the hearing this claim was abandoned, and a new one set up, by purchase, since the commencement of the action, of the soil and bed of the river all the way from *Cobham Bridge* downwards, from persons who had obtained it by grant from the Crown in 1820. Since that time the property so granted has been in settlement, and has practically belonged to successive tenants for life till the last few years. As the real question is the public right of using the river, the Plaintiff was permitted to issue a new writ relying upon the title to the bed of the river thus acquired derivatively under the Crown grant in 1820, the question of costs being left to the Court.

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The Defendant justifies his acts as one of the public. His case is that the river from *Cobham Bridge* through *Esher Bridge* to the paper mills is a highway. He makes no claim for a right of recreation by custom. Such a claim is known to our law, but is carefully restricted. It cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district: *Fitch* v. *Rawling* (1); *Earl of Coventry* v. *Willes* (2). For all the purposes of this case the right claimed is similar to a right of highway on land not covered by water. In *Orr-Ewing* v. *Colquhoun* (3) Lord *Hatherley*, L.C., speaking of the River *Leven*, a non-tidal river in *Scotland*, says (4): "There are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way." Lord *Blackburn* in the same case says (5): "There was evidence of user in this waterway by vessels, such that similar evidence, if the question had been as to the user of a land-way by carriages, would have established the public right."

I must treat the claim of the Defendant, therefore, as if it were a claim to establish a right of highway on dry land. Now, in the case of such a claim, a very material consideration is, by whom has the roadway been metalled, repaired, and maintained in order. In a dispute as to the alleged right, the answer to this question may be decisive. Here there has been no maintenance of the waterway by any one, except that the mill-owner,—I suppose, to ensure the flow of water to his mill,—seems to have employed men to dredge out the silt or ballast, as it is called. The width and direction are defined by the banks of the river. I asked during the argument if there was any authority for saying that a lake in private grounds, touched at one point only by a public road, could be subjected to a right which would make it a highway by persons launching boats from the road and boating on it for pleasure. No such authority has been produced. But reference was made to *Marshall* v. *Ulleswater Steam Navigation Company* (6). That case, however, was one in which the right of

(1) 2 H. Bl. 393.
(2) 9 L. T. (N.S.) 384.
(3) 2 App. Cas. 839.
(4) 2 App. Cas. 846.
(5) Ibid. 848.
(6) Law Rep. 7 Q. B. 166.

navigation in the *Ulleswater* lake was admitted, although the soil of the bed of the lake was said to be vested in the plaintiff. How the right was acquired does not appear, nor does the actual decision touch any of the questions which have to be decided in this case. The nearest analogy in the case of a way claimed on dry land would be to suppose a track determined by an avenue of trees some miles long in the park or other land of a private owner, to which there was no public access save from a road crossing it at right angles, and to suppose that persons driving along that road had been accustomed, when they pleased, to turn into one or other part of this avenue and drive up and down it for pleasure. Would that user, however long continued, make that avenue a highway, or would the legal inference be that such use being merely for amusement had always been permissive, which, of course, could not grow into a right? When it is sought to establish a right by evidence of user it is not enough to say that such a right might be the subject of an actual grant. Lord *St. Leonards*, L.C., said, in *Dyce* v. *Hay* (1), that "it does not follow, that, because a right may be granted—that is, because it is grantable by law—therefore it may be prescribed for."

Another important fact is that the way claimed is not a way from one public place to another. In *Campbell* v. *Lang* (2) Lord *Cranworth*, L.C., said (3) that, speaking generally, "a public right of way means a right to the public of passing from one public place to another public place. It was suggested that by the law of *Scotland* there might be a public right of way from a given public place, but neither terminating in a public place, nor leading to a public place. I doubt whether that can be the law of *Scotland* any more than it is the law of *England*." The only portion of the way in dispute in that case was across the park of the appellant to the confluence of the Rivers *Clyde* and *Cart*. But the Lord Chancellor said:—"The abstract question whether the confluence of two rivers can be a *terminus a quo*, or a *terminus ad quem*, of a public right of way, does not, in the present case, arise. The question here is as to a public right of

(1) 1 Macq. 305, 312. (2) 1 Macq. 451.
(3) 1 Macq. 453.

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way, up to and which may extend beyond, the confluence, a right to go further on, so as ultimately to reach a good *terminus ad quem.*" I have referred to the report of the case (1), where it is stated that the claim was to a footpath to the confluence of the *Clyde* and *Cart*, "and communicating with a path along the east bank of the *Cart* leading to *Inchinnan Bridge.*"

In *Young* v. *Cuthbertson* (2), the question arose upon an issue directed whether there existed a public right of way through the Appellant's land to *Starleyburn*, and the appeal was from the disallowance of exceptions to the directions of the Lord Justice Clerk who tried the case. Lord *Cranworth*, L.C., said (3):—"It was said that the issue was objectionable for this reason, that *Starleyburn* is not a public place; but even supposing that *Starleyburn* is not a public place, still if the right of way went beyond it, that would be sufficient. If indeed *Starleyburn* had been a mere private house, to which the public had been in the habit of going from *Burntisland* and returning back again, I believe the case would not have properly come within the description of a public right of way; for the owner might destroy the house and shut up the way, and then there would be an end of it. But here the right of way extended further. It had a public terminus at each end. If *Starleyburn* were not a public place, then in order to prove a public right of way, the party must prove that the road to *Starleyburn*, and beyond *Starleyburn* on to *Aberdour*, was a public road. So held the learned Judge, and I quite agree."

The right claimed by the Defendant in the present action does not, as I have pointed out, fulfil this condition. There is no public access to the river at *Cobham Bridge* or navigable waterway beyond. Nor do I think there is any public access at *Esher Bridge*, and it is doubtful if there is at the paper mill. The right claimed is therefore a right of boating up and down in a part of a river which has no public access, at one end at any rate.

But it is argued that a *cul-de-sac* may be a highway. That is so in a street in a town into which houses open and which is

(1) 13 Court Sess. Cas. 2nd Series, 1180. (2) 1 Macq. 455.
(3) 1 Macq. 457.

repaired, sewered, and lighted by the public authority at the expense of the public. Lord *Cranworth* instances *Connaught Place*, which opens into the *Edgware Road*; *Young* v. *Cuthbertson* (1), and see *Rugby Charity* v. *Merryweather* (2). But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended. This is one obvious objection to the Defendant's claim.

I have examined the evidence in this case with care. Many of the witnesses were labourers, many were very old persons, speaking from obviously defective recollection. Very many broke down completely under cross-examination. The true result of the evidence is this. As far back as any one can recollect there has been boating on this part of the river *Mole*. Originally it was only by the owners and occupiers of land on the banks who kept punts, and then some few boats for the use of themselves and their workmen, and lent them occasionally to friends. Then by degrees, and at first quite secretly, a few persons occupying land on the river bank began to take remuneration for lending their boats. They did not make any charge, but received what the borrower chose to give. In one case, it is said, a shoulder of mutton was given by a butcher for the use of a boat, though the alleged recipient denies it. In another case the boat-owner, meeting a man who had borrowed it, suggested to him that he had made no payment, and apologized for the suggestion by saying that it was a perquisite for his son, who took care of the boat. The persons who so began to let boats were chiefly the successive occupants of a cottage near *Esher Bridge*. This cottage had a garden which went down to the river, and within the garden was a creek leading from the river next to the bridge road, in which boats were kept. These cottagers were intrusted with the care of boats belonging to private owners; and by degrees acquired one or two boats of their own, and let or lent these in the manner I have described. Besides this, adventurous persons from the neighbourhood of *Walton* or *Thames Ditton*, and sometimes from *London*, have hired canoes and sometimes boats from boat-builders on the *Thames*, and sent them on to the *Mole*, generally by the road to the paper mill, for a day's excursion in

(1) 1 Macq. 456. (2) 11 East, 375, n.

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the summer time, and this practice has been more frequent of late years till somewhat interfered with by the Defendant's letting of boats. This growing practice of boating for pleasure, including fishing, has not been effectively interfered with till the Plaintiff put his obstruction across the stream. There is some evidence that Mr. *Spicer*, who owned land below *Esher Bridge*, made objection to persons who were not landowners on the river. One of these owners, Sir *Richard Frederick*, also made objection, and since 1864 there has been a notice fixed up near the river, in one part of this section of it, warning persons against trespassing in boats for fishing or otherwise. Probably the riparian owners did not care to interfere with one another in boating, if they had the right to interfere, and it was not easy to distinguish strangers. The real owners of the bed of the stream under the Crown grant in 1820 had no land on this part of it. They did not interfere.

Now, does this evidence establish that the river is a highway? On the one hand, the Court would be reluctant to interfere with a healthy recreation for the people, especially in a populous district like *Esher*, and within reach of such a city as *London*. On the other, care must be taken that private property is not unduly invaded. If the Defendant is right, he or any other person in *England* may launch a number of canoes, boats, barges, steam launches, or the like upon this river, fill it with a crowd of pleasure-seekers, and utterly destroy the privacy of those who have houses on the stream. The use at present made of it by the public is very inconsiderable; and an interference will do very little harm to any one except to the Defendant in his business of letting boats. It is the interest of the public that such rights should not easily be acquired, otherwise landowners would be more chary of giving the public access to their property. I cannot overlook these considerations, though they do not determine the questions of law involved in this dispute. Upon these questions my opinion is against the Defendant. His claim is to impose on land a new servitude, or rather to establish a highway under conditions which are inconsistent with a right of that kind. I think the true inference from all the evidence is that the use made of the river has been permissive, and not of right.

It is material to that question that much of the evidence shews that those who boated on this river did so in many cases for the purpose of fishing. There is no pretence that there is any public right of fishing, or any evidence that could establish such a right. The fishing, then, must have been permissive, and it is difficult to say that boating for that purpose could have been of right. Moreover, the mode in which those who let boats took remuneration shews they were aware it would probably be objected to, if known, and that they clearly understood that strangers only boated there by tolerance. It is possible that the riparian proprietors may be able to establish a private right of way, or a right of boating for recreation for themselves and their friends by custom. I do not give any opinion on the question whether there is any such right or custom. Neither would entitle the public to boat on the river or support the claim that it is a highway.

Even if the boating of the public, so far as they have used it, was not permissive, I am of opinion, for the reasons I have given, that the Defendant has not proved that this part of the river *Mole* is a highway; and, as his claim is that and nothing else, I dismiss his counter-claim with costs. As the Defendant is not a riparian proprietor, and only claims as one of the public, he had no right to remove the obstruction placed by the Plaintiff in the river. But I must take it to be clear that the Plaintiff, when he placed that obstruction in the river, was acting under a supposed right to the bed of the river as riparian proprietor which he now admits he had not. Under the grant from the real owners, he has since obtained the soil of the river bed, and may now maintain that obstruction against the Defendant at any rate.

There must, therefore, be an injunction to restrain the Defendant from interfering with it. I give no costs of the Plaintiff's action, but order him to pay the Defendant's costs of it, up to the time when the new writ was issued. I think the evidence should all be treated as taken on the counter-claim, except the proof of the Plaintiff's title; and the costs of the evidence, with that exception, must be paid by the Defendant. The summons by the Defendant to have this action tried by a jury

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I refuse with costs. There must be the usual directions for set-off.

I desire to call the attention of the profession to a matter of importance which has been forcibly brought to my notice in this case—I mean the duty of commissioners to administer oaths where a witness is swearing to the contents of an affidavit. In this case certain witnesses contradicted the statements made by them in affidavits sworn in this cause in such a startling manner that I required an explanation of the mode in which those affidavits were sworn. The commissioner before whom they were sworn attended in Court, and in answer to questions from me he informed me that he went with a solicitor in the cause to the houses of the several witnesses; that the affidavits were not read over in his presence, and that he took no means to ascertain whether the witnesses knew to what they were swearing. I was told by counsel that this mode of performing the duty of a commissioner to administer oaths was not uncommon. I must express my strong disapproval of such a practice. The commissioner's duty before he administers the oath is to satisfy himself that the witness does thoroughly understand what he is going to swear to; and he should not be satisfied on this point by any one but the witness himself. For this reason it has been the rule since the time of Lord *Hardwicke* that the Court does not accept an affidavit sworn before the solicitor in the cause, nor his clerk, although he may be a commissioner: *Re Hogan* (1); *Wood* v. *Harpur* (2); *Hopkin* v. *Hopkin* (3); *Duke of Northumberland* v. *Todd* (4). The Court requires the security of an independent commissioner, and it is obvious that he ought not to take only the statement of a solicitor in the cause that the witness knows what is in the affidavit. Where, as in this case, many of the witnesses are in a humble position of life, I do not see how the commissioner can be satisfied without having the affidavits read over in his presence. If an educated man says to him, "I have read over this affidavit, to the truth of which I am going to swear, and all the statements in it are accurate," that may in some cases be sufficient. But I confess I wish that it was made incumbent

(1) 3 Atk. 813.
(2) 3 Beav. 290.
(3) 10 Hare, App. ii.
(4) 7 Ch. D. 777, 780.

upon the commissioner in every case to go through the affidavit with the witness, and to refuse to take his oath until he was satisfied that the witness understood and intended every statement in it. A great deal of false swearing would be prevented if this were done.

Solicitors: *Lewis & Lewis; Thomas Noton.*

C. C. M. D.

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Feb. 21; *March* 7.

In re TAYLOR. TURPIN *v.* PAIN.

[1886 T. 1458.]

Practice—Official Referee—Reference for Inquiry and Report—Form of Report—Application to remit—Judicature Act, 1873, *s.* 56 [*Revised Ed. Statutes, vol. xvii. p.* 86].

An Official Referee is not bound to take accounts and inquiries referred to him for report under *Judicature Act,* 1873, s. 56, in the strict way usually adopted before a Chief Clerk in Chambers; though he may adopt that method if he finds it convenient and likely to advance the ends of justice.

Practice and method of taking accounts in Chambers and before an Official Referee stated, compared, and discussed.

MOTION.

Mary Ann Taylor, a widow, died in August, 1872, having by her will appointed her brothers, *Philip Pain* and *William Pain,* her executors and trustees, and directed them to carry on her farming business at *Gooseheys Farm,* and employ the capital embarked therein, together with any other part of her personal estate which might be required for that purpose, during the remainder of the term for which she held the farm; she directed her trustees to stand possessed of the clear profits arising from her said business upon the trusts thereinafter declared concerning her residuary estate and, after the expiration of the said term, she gave her implements and utensils of husbandry with her household furniture and effects to her son *Philip Thomas Taylor,* and bequeathed the residue of her personal estate, including profits arising from the carrying on of her said business, upon trust, thereout to provide for the maintenance and education of all her children during their minorities and until her estate should be divisible under the trusts of her will, and after the youngest of her children should attain the age of twenty-one years, in trust to divide the same among all her children equally. She also empowered her trustees after the expiration of the said term to advance and pay to her said son *Philip Thomas Taylor* his share

under her will. The testatrix left five children, one son and four daughters, the youngest of whom attained the age of twenty-one in October, 1885.

In August, 1886, the present action was commenced by the four daughters, the eldest being a married woman, against the trustees, claiming an account of the testatrix's personal estate, on the footing of wilful default, and administration.

By an order of the 14th of May, 1887, the following inquiries and accounts were directed: (1) An inquiry of what the testatrix's estate consisted at the time of her death. (2) An account of the dealings and transactions of the Defendants in the carrying on of the business of the testatrix at *Gooseheys Farm* from her death to September, 1877. (3) An account of the receipts and payments of the Defendants in respect of the estate of the testatrix other than those comprised in account No. 2. (4) An inquiry of what the testatrix's estate consisted at the date of the order. These accounts and inquiries were subsequently extended by an order of the 15th of December, 1887, so as to include the estate of the testatrix's late husband *Philip Taylor* (whose farming business she had carried on), from whom the bulk of the estate comprised in her will was derived. The Defendants had kept no proper accounts, and after the inquiries and accounts had been prosecuted in Chambers for two years without making any effectual progress, they were referred by an Order of the 11th of November, 1889, to Mr. *Hemming*, Q.C., one of the Official Referees, under the *Judicature Act*, 1873, s. 56, to take the accounts and report thereon to the Court.

The main question in dispute in Chambers and before the Official Referee, and the only one calling for a detailed report, was raised on accounts 2 and 3. The facts, shewing the way in which the Defendants carried on the farming business, and the difficulties in taking the accounts, are sufficiently set out in the Official Referee's reports.

The Official Referee by his report, dated the 24th of December, 1889, and filed the 8th of January, 1890, after reporting in answer to inquiry No. 1, and stating the number and ages of the five children, continued: "The trustees who proved the will and shortly afterwards took out administration *de bonis non* to the

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estate of *Philip Taylor*, allowed the children to occupy the farmhouse and employed the son as their bailiff in managing the farm. All sales and purchases were effected by the trustees, and they paid about once a week to the son the moneys required, whether for labour and expenses on the farm or for household expenses. These sums were never distinguished, and in this account I have necessarily included payments for household expenses among the payments on account of the farm. This mode of conducting the business went on until the term of the lease expired in Michaelmas, 1877. *Philip Thomas Taylor* then became tenant of the farm on his own account, and acquired certain farming and household effects under the will. He allowed his four sisters to remain in the farmhouse, and provided for their support. On taking over the farm, *Philip Thomas Taylor* took over part of the assets, and his liability to the trustees was valued at £689 17*s.* 6*d.* The trustees (who had power from time to time to advance to *P. T. Taylor* his share of the estate, and also to provide maintenance for the children) allowed this valuation to remain unpaid, and from time to time furnished *P. T. Taylor* with moneys towards household expenses, and with further moneys towards meeting his expenses on the farm by occasional payments of rent tithes or other liabilities, and by money payments from time to time. Some portion of these payments could be traced to specific household expenses, others to specific farm expenses, while in the remaining instances it was not possible to discriminate between the two. The total amount so paid between 1877 and 1880 was £764 18*s.* 7*d.* None of these payments were made in express terms by way of maintenance and advances; but as the trustees had power to make them I have allowed them in account No. 3 as payments under the maintenance and advancement powers, notwithstanding any defect in the form of the transactions. There appeared to be no doubt that the most beneficial way of providing a home for the children was to allow them to be kept by *P. T. Taylor* at the farmhouse, and to supply such pecuniary assistance as was required to enable the farm to be kept on, so long as there was a prospect of its being worked successfully. In the year 1880 the farming had become unprosperous, and *P. T. Taylor* gave up the farm and made an

arrangement with his creditors under which the trustees obtained a sum of £532 4*s.* 2*d.* on account of the valuation debt of £689 17*s.* 6*d.* After this date the trustees provided a cottage for the daughters and maintained them there at an expense of little more than £150 a year.

"In respect of account No. 2, I report as follows:—

"The trustees have received £9758 0*s.* 4*d.*, and have paid £9823 6*s.* 11*d.*, leaving a balance in their favour of £65 6*s.* 7*d.*

"In respect of account No. 3, I report as follows:—

"The trustees have received £5061 19*s.* 6*d.* and have paid £5080 7*s.* 2*d.*, leaving a balance in their favour of £18 7*s.* 8*d.*"

On the 21st of February, 1890, the Plaintiffs moved to remit this report to the Official Referee, or some other Official Referee, with directions that such accounts be taken in the way usual in the Chancery Division before a Chief Clerk and vouched accordingly; that directions be given to such Referee that he take the accounts rendered by the Defendants and filed before the date of the order of reference; and that directions be given to such Referee to state in his report which of the items in the accounts rendered by the Defendants have been allowed and disallowed by him respectively, and to shew what, if any, sums not mentioned in such accounts he has charged against the Defendants.

After the motion had been opened, the matter was adjourned at the suggestion of the Judge, to enable the Defendants' counsel to point out from the Referee's notes, a copy of which had been supplied, how the sums allowed by him in his report had been arrived at, and that the Judge might in the meantime inquire further of the Referee.

On the 6th of March, 1890, the Referee, at the request of the Judge, and after an interview with him, made a further report, shewing the difficulties of the case and the method adopted by him in taking the accounts, which, so far as material for the purposes of this report, was as follows:—

"These accounts have been prosecuted in Chambers for more than two years without making any effectual progress, and were then referred to me. The failure in Chambers was plainly due to the fact that the case was one to which the customary pro-

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cedure in Chambers was quite inappropriate, and it was no doubt sent to me for that reason.

"The method pursued in Chambers in taking accounts is:

"1. To require an account from the accounting party or parties to be verified by affidavit.

"2. To have the items of this account vouched, and to take evidence by affidavit (with cross-examination occasionally) as to every disputed item.

"3. To allow, disallow, or vary each item from beginning to end of the account.

"The cases which occur may be divided into three classes.

"1. Where the accounting party is able to produce and verify an approximate account, and the details are not too extensive or complicated.

"2. Where the accounting party is unable to produce and verify an approximate account.

"3. Where the accounts are so extensive or complicated that the Chambers procedure involves an amount of delay equivalent to a denial of justice.

"In the first class of cases the methods employed in Chambers (though necessarily slow) bring out all the exact details, not only of the items disputed before the Chief Clerk, but also of the items (generally the great majority of the whole) which have been accepted or not seriously questioned before him.

"Cases of this description to which the methods of Chambers are applicable are now very seldom sent to Official Referees for the obvious reason that a Chief Clerk, having at his disposal a staff of junior accountant clerks to do the vouching and other mechanical work, can deal with them much more rapidly than an Official Referee, who works single-handed.

"In the second class of cases, the procedure of Chambers breaks down altogether (as it did in this case for two years) from the impossibility of getting an account from which to start the inquiry.

"In the third class, the Chambers procedure practically breaks down from enormous delay, even though a staff of clerks is available for the work. An illustration of this may be seen in the case of *Macintosh* v. *Great Western Railway Company* (1), in which

(1) 1 D. J. & S. 443.

it was held by the Court of Appeal that a Chief Clerk was not at liberty to depart, even in so extreme a case, from the usual form of certificate. The result, I believe, was that after some twenty or thirty years of useless and costly litigation, the executors of the plaintiff (then long dead) were driven to accept a lump sum compromise rather than continue the contest.

"It is chiefly cases of the second and third classes which, according to the recent practice, have been sent to Official Referees.

"*Turpin* v. *Pain* was a case involving the difficulties both of the second and third classes.

"The testatrix appointed as trustees her two brothers, one a farmer and the other a cattle-dealer. They, though very suitable persons for carrying on the management of a trust farm, knew very little about accounts, and kept none beyond their ordinary market books of sales and purchases, and the cheques and pass-books of the executorship account.

"After a lapse of many years these materials were insufficient to enable them to produce an approximate account.

"They severed in their defence. One of them gave such materials as he had, or could discover from the Plaintiffs, to an accountant, to do what he could with them, and the other entrusted his solicitor with a like duty, and they produced accounts for their respective employers which were not in harmony with one another, and were too defective in form to supply the basis of investigation in the usual way. The trustees could not verify these accounts on oath, and the accountant could say no more than that his account was as good as it could be made with such materials as he had.

"If I had insisted on waiting for the production of a suitable account to work upon, I should probably have spent another two years, or more, to as little purpose as the first two had been spent in Chambers.

"I therefore pursued a course analogous to that which I have found to work satisfactorily in dealing with the numerous complicated accounts which have been referred to me from the Queen's Bench Division.

"I collated such documents as could be found, with the *vivâ voce* evidence of every one who knew anything about the matter,

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and, among others, of the testatrix's eldest son (one of the five residuary legatees), who had managed the farm for his mother while she lived, and had been continued as bailiff by the trustees after her death. Fortunately, he had a book in which he had, in an informal way, made entries of the sales and purchases effected by the trustees in carrying on the farm, as well as notes of the money expended by himself for wages, maintenance of his four infant sisters at the farm-house, and other petty outgoings.

"With these materials, I was able, after a close investigation of eight days, to get at the aggregate expenditure and receipts of the trustees; and after I had made some progress with the evidence, I obtained from the accountant, who had acted for one of the trustees a fresh account, on lines which I indicated to him, which greatly assisted me, though it was not an account which I could have taken as the basis of investigation on the Chambers method, because it was not in its form and character suitable to be so dealt with, and because, in fact, it was essentially my rough account, and not one by which either of the trustees could be held bound.

"I understand that it has been suggested that the result attained by the method I pursued does not give the same facility for reviewing my decision on particular items which the procedure in Chambers, resulting in a common form certificate, would give.

"This is only true to this extent—that it does not afford materials for opening up new questions on items which were not made the subject of controversy before me.

"As to all points which were taken before me, my notes will afford at least as great facilities as an ordinary Chief Clerk's certificate for re-arguing them before the Court. I think, in fact, the facilities will be found greater, as there will be less difficulty in tracing any specific matter through my notes than in hunting it down through a vast mass of affidavits."

Maclean, Q.C., and *Redman*, for the motion:—

The Referee's report, in the form in which he has presented it, does not give the same facilities for reviewing his findings on any particular items as a Chief Clerk's certificate. The report

simply states the result of accounts 2 and 3. It ought to have set out what items he has allowed, and what items he has disallowed. The accounts should, therefore, be remitted to him to do this: *Burrard* v. *Calisher* (1). The report in this form is final, and we are unable to make out from the report how these amounts have been arrived at. Further, we say that the Official Referee proceeded on a wrong principle in placing upon us the onus of objecting to the items in the accounts brought in by the trustees. The trustees ought to have brought in their accounts, and vouched them in the way usual before a Chief Clerk in Chambers.

Romer, Q.C., and *Curtis Price*, for the first Defendant:—

To have adopted the strict way of taking accounts in Chambers would in this case have amounted to a denial of justice. The Referee has taken the accounts in the only way possible. He has stated the principle on which he went, and, with his notes, this is sufficient to enable the Plaintiffs to point out any specific item that they object to. The motion is wrong, and should be refused.

[CHITTY, J., mentioned *Dunkirk Colliery Company* v. *Lever* (2).]

Walker v. *Bunkell* (3); *Baroness Wenlock* v. *River Dee Company* (4); *Burrard* v. *Calisher* (5) were also referred to.

Byrne, Q.C., *Haldane*, Q.C., and *Sheldon*, for the second Defendant, also opposed the motion, and adopted the argument of the first Defendant.

Maclean, in reply.

CHITTY, J., after stating the facts, and observing that there was no charge of dishonesty against the Defendants, the trustees, stated the difficulty which had arisen in taking the accounts from the peculiar circumstances of the case, and from the fact that the trustees had kept no proper accounts, and having referred

(1) 51 L. J. (Ch.) 223.
(2) 9 Ch. D. 20.
(3) 22 Ch. D. 722.
(4) 19 Q. B. D. 155.
(5) 19 Ch. D. 644.

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to the system of taking accounts in Chambers, and the way in which it had broken down in the present case, continued:—

It is a strong observation to make with regard to these matters, that the delay which can and does take place in some very intricate accounts almost amounts to a denial of justice. Of course, trustees ought to keep accounts, and I am not at liberty for a moment to say that these trustees, the one being a farmer and the other a cattle-salesman, are exempt from the ordinary law; neither am I in a position to attempt to draw any distinction between the accounts to be kept by different kinds of trustees, because I should then have to weigh the capacity of each individual in golden scales, and say that such and such a man is one who ought to keep perfect accounts, and another should keep less perfect accounts, and others should keep none at all. It is not possible for a judge to make these varying distinctions. Those against whom it is proved that they did not keep accounts render themselves liable to be charged with moneys they have received. The proper remedy with regard to the non-keeping of accounts is, in a proper case, to disallow the costs of taking them, or direct the trustees to pay them. I have nothing to do with anything of that kind in the case before me. [His Lordship then referred to the report of the Official Referee as set out above, which he read, and continued:—]

That is a short and graphic account of what took place, and what these trustees did; from which it appears that, though they did not act strictly, they were doing the best they could for the family as trustees, and according to the best judgment that they could form. Then the Referee goes on to give the lump sums, the result of his investigations, leaving a small balance in favour of the trustees, and that is his report. Now I have a motion before me which asks me to deal with this matter strictly: first, I am asked to remit this report, with directions that these accounts be taken and vouched in the way usually adopted before a Chief Clerk; this part of the motion was not seriously pressed at the Bar. The Official Referee could not take these accounts in that way; an attempt was made to do so in Chambers, which failed. The Official Referee, in my judgment, is not bound to take accounts referred to him in the same way as the Chief Clerks

do: if this had been intended provision would have been made by the general orders to this effect. I have referred to some of the rules, such as Order XXXIII., rules 3, 4, and 4*a*, for the purpose of shewing that they are dealing only with a particular method of taking accounts before a Chief Clerk in Chambers. There is an advantage, in some instances, in taking the accounts before the Official Referee according to the existing practice. The Official Referee does not proceed by affidavit and then by cross-examination; what he can do, and what he has done in this case, is, to have the witnesses before him, and the accounts, and also all the account-books, and then to sit continuously, as he did in this case, till the matter is finished. The parties come before him and give their evidence *vivâ voce*, certain accounts are produced, and evidence is taken there and then upon the matter, and there is cross-examination, of course, if need be; the Referee has seen the witnesses, and has made notes, and I have a copy of the voluminous notes which were taken by him in this case. These notes contain all the materials upon which the Referee proceeded. This method of taking accounts is similar to that adopted by the Masters in the Queen's Bench Division. No doubt it is not so formal or so rigid as is the manner of taking accounts in the Chancery Division, and the reason is, putting it generally, that the matter to be inquired into, and the accounts to be taken, do not stand on the same footing. On this part of the motion, therefore, I am of opinion that the Official Referee is not bound to take these accounts in the same way as a Chief Clerk does; of course he may adopt that method if he finds it convenient and likely to advance the ends of justice: he may have regular accounts before him, and having drawn his report referring to these accounts may say that he has allowed this item and disallowed that, but to take such an instance as the one the Referee had before him in this case, with the farming account mixed up with the household account and again mixed up with advances to the son, and having regard to the state of the family during the time to which the accounts relate, he could not properly have taken the accounts in the way adopted in Chambers, and accordingly this part of the application fails.

Then I am asked to give directions to the Official Referee to

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take the accounts rendered by the Defendants and filed before the date of the order of reference, and to state which of the items in these accounts he has allowed, and disallowed, and what, if any, sums not mentioned in such accounts he has charged against the Defendants. This part of the motion, as presented to me in argument at the Bar, resolved itself into this. It is said by those who are not satisfied with the report that it is in such a form that they cannot attack it, and the force of the argument is that the report is practically final. The Referee was not directed to conclude the matter, that is to say, to try it as if it were the trial of the action and enter judgment; he is only directed under the 56th section of the *Judicature Act*, 1873, to inquire and report, and he has made a report in such a form that the Plaintiffs say they cannot put their finger on anything, and bring it before the Court as a matter with regard to which they can say that the Referee has erred. There is one observation to be made, viz., that in this report the Official Referee has found the total amount of receipts and the total of payments, and he has found a balance; but it is obvious from what I have said that he has not stated in the report on what accounts he has proceeded; and he has not as a fact proceeded on any particular account with specific numbers to every item. It was arranged between the parties that I should see the Official Referee, and thinking it would be much more satisfactory to them that I should have something in writing from him, rather than a mere report of what had taken place between us, I have asked him to prepare and have received from him a detailed statement or second report on the particular points which had been urged before me when this motion was first opened. My suggestion to the Official Referee was, whether he could not go through the accounts, or rather go through the materials before him again, and point out in some way, by reference to the items or sets of items, what he had allowed or partially allowed, or disallowed or partially disallowed; but the substance of what he tells me is that he cannot do so. The Official Referee's additional report, which is of very considerable value, classifies the various kinds of accounts and is as follows. [His Lordship read the report as set out above, and continued:—] There are in Court what I have already referred to, viz., the notes of the

Official Referee written out in an engrossing hand which is perfectly legible, and which anyone can read through who wishes to do so. Now this is a peculiar case, and if I thought that the report was really in such a form that the Plaintiffs could not attack it I might have acceded to this application—reluctantly I admit, because such a course would probably have only led to further expense, delay, and vexation. I might, however, have been induced to send the report back, not generally, but so that the Official Referee might on the face of his report have pointed out generally or specifically, as the case permitted, the items which were allowed or disallowed by reference to some document. But I think in the circumstances of this case it would be wrong to do this, because I am satisfied by this second report that if there are any special grounds for attacking the report, not as a matter of form, but as a matter of substance, there are here all the materials upon which to do it. No doubt counsel would find it a very great labour to read through all the Official Referee's notes to understand them and to put the items together; but the parties who were before the Official Referee will be able, if there is really any ground for saying that substantial justice has not been done, by reference to these notes to pick out the material points and bring them before the Court. I referred in the course of the argument to *Dunkirk Colliery Company* v. *Lever* (1); there it was a question of ascertaining damages, but it was a complicated case, and the notes were very voluminous; the matter was brought before the late Master of the Rolls, and it was afterwards taken before the Court of Appeal. There the task was imposed on those who objected to the report of going through the notes and pointing out on what matters it was considered the report could be attacked, and where the Referee had erred. There was some success in that case; the time and labour which were imposed were great; but that is no reason why in such a special case as I have before me I should insist on form to such an extent as would in substance result in a denial of justice. The result is that this part also of the Plaintiffs' application, fails. At the present moment I am not asked to adopt the report or to reject it; I am simply asked to send it back to the Official Referee with

(1) 9 Ch. D. 20.

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directions. The motion must accordingly be refused, and I make the Defendants, the trustees, costs, their costs in any event.

Solicitors: *Child & Norton; A. H. Hunt & Co.; Haynes & Clifton.*

W. C. D.

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1890
March 15, 18.

In re BUILDING SOCIETIES' TRUST, LIMITED.

Company—Winding-up—Two Petitions—Advertisement—Priority—Costs.

A creditor, presenting a winding-up petition, with notice that another creditor has already presented a petition with the same object, does so at his own risk as to costs, and must prove, not merely that he has reason to suspect that the first petition was not *bonâ fide* presented, but that *mala fides* or collusion actually exists: *Re Norton Iron Company* (1) followed.

Where two or more petitions are presented, they will, in the absence of *mala fides*, take priority according to their dates of presentation, not according to their dates of advertisement: *Re United Ports and General Insurance Company* (2) discussed, and not followed.

In re Trades Bank Company (3) explained.

ON the 25th of February, 1890, *Daniel Charles Laughton*, a creditor of the above-named company, presented a petition for a compulsory winding-up, which was answered for the 15th of March. This petition was advertised on the 7th of March.

On the 4th of March, 1890, another creditor, *George Pooley*, presented another petition for a compulsory winding-up, which was also answered for the 15th of March. This petition was advertised on the 4th of March. Both petitions were in the cause list for the 15th of March, that of *Laughton's* being first. Both petitions came on for hearing together, and the only question raised and calling for a report was, whether the winding-up order should be made on the one that had been first presented, or on the one that had been first advertised.

There was evidence in explanation of the delay which had apparently taken place in advertising *Laughton's* petition, that some attempt had been made, on behalf of the company, to

(1) 47 L. J. (Ch.) 9. (2) 39 L. J. (Ch.) 146.
(3) W. N. 1877, p. 268.

arrange for the payment of *Laughton's* debt, and that he had been requested by one of the directors to abstain from advertising his petition till the last moment, with a view to his claims being settled.

Romer, Q.C., and *Oswald*, for *Laughton's* petition:—

The date of presentation, not of advertisement, fixes the priority. As soon as *Pooley* presented his petition he must, under the present practice, have had notice that a winding-up petition was already on the file, and if he then went on it was at his own risk. The right rule is that laid down in *Re Norton Iron Company* (1). The winding-up order should be made on the one that was presented first, as it is a *bonâ fide* petition, and the other petition should be dismissed.

Byrne, Q.C., and *T. B. Napier*, for *Pooley's* petition:—

Where two or more petitions are presented for a winding-up order, they take priority according to their dates of advertisement, not according to their dates of presentation: *Re United Ports and General Insurance Company* (2); *In re Trades Bank Company* (3). This is stated to be the rule in *Buckley* on Companies Act (4), and *Chadwyck Healey* on Company Law and Practice (5). When one order is made on several petitions, the carriage of the order is given to the one that is advertised first: *In re London and Australian Agency Corporation* (6). That is the order we now ask for.

Romer, in reply:—

If the first petition is collusive, or the Court finds that the second petition was necessary and *bonâ fide*, it may then look at the priority of advertisement. But in this case the second petition was wrongly presented, and the question of priority does not arise.

[CHITTY, J.:—I see in *Re Norton Iron Company* nothing is said about the dates of advertisement. *In re General Financial*

(1) 47 L. J. (Ch.) 9.
(2) 39 L. J. (Ch.) 146.
(3) W. N. 1877, p. 268.
(4) 5th Ed. pp. 215 and 611.
(5) 2nd Ed. p. 458.
(6) 29 L. T. (N.S.) 417.

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Bank (1) lays down the law very much in the same terms as *Re Norton Iron Company* (2), which I always considered settled the law.]

The Court always had a discretion to say to whom the conduct of the winding-up should be given.

Douglas, for a judgment creditor, supported the application for a winding-up.

CHITTY, J.:—

There are two petitions before me for the winding-up of this company, *Laughton's* presented on the 25th of February, and *Pooley's* on the 4th of March, both answered for the 15th, and the question is, upon which of these two the winding-up order is to be made. I have made inquiries as to the present practice at the Registrar's office with regard to answering these winding-up petitions, and I am informed that the Registrar, or rather the Registrar's clerk, now allows the petitioner's solicitor some voice in selecting the day for which the petition shall be answered. *Laughton's* petition might have been answered for the 8th of March, and that date would have given time for issuing the necessary advertisement, so that his solicitor might have asked to have the petition answered for either the 8th or the 15th of March, for it appears that the Registrar's clerk allows some such margin as a matter of course; but if the petitioner's solicitor had asked to postpone the date of answering, say for a month, the Registrar's clerk would not have acceded to his request as a matter of course, without some explanation or further inquiry. If a petitioner chooses to get his petition answered for a day later than is necessary, of course he runs the risk of a second petitioner coming in, getting his petition heard, and obtaining an order before the first petition can be heard; so in the case before me, if the petitioner *Pooley* could have got his petition answered for the 8th of March, he could have obtained a winding-up order, notwithstanding the fact that the other petition was still pending, and had been answered for the 15th of March.

(1) 20 Ch. D. 276. (2) 47 L. J. (Ch.) 9.

The fact that *Laughton* elected to have his petition answered for the 15th of March is no evidence against him of want of *bona fides*. No blame can be attached to him for not having his petition answered earlier, or for not having advertised it earlier than the 7th of March, as he might have done, because there may be circumstances in which the issue of the advertisements might be very fairly and reasonably postponed. The result, therefore, is that *Laughton's* petition was, in my opinion, *bonâ fide* and rightly presented.

Now I come to *Pooley's* petition, which was presented on the 4th of March, advertised the same day, and answered for the 15th. According to the present practice, a second petitioner presenting a petition always has notice, must in fact have notice, that there is an earlier petition already on the file. What advantage, then, was there to be gained by the second petitioner in going on with his petition, when the 15th of March was the earliest day for which his petition could have been answered, and then it must have come on before the same Judge as *Laughton's* petition, for the Registrars now always assign a second petition to the Judge who has seisin, as it were, of the first. There was nothing to be gained by going on with the second petition, if the first was *bonâ fide* and rightly presented. Adopting the rule laid down by the late Master of the Rolls in *Re Norton Iron Company* (1), I say that the second petitioner, *Pooley*, being aware of the presentation of the first petition, would have been right in going on with his petition had he been in a position to shew that the first petition was not a proper petition—*i.e.*, presented not in good faith or collusively. If he could have maintained any such case, he would have been justified in bringing his petition to a hearing; but, as the late Master of the Rolls points out in *Re Norton Iron Company*, if a creditor presents a second petition merely on suspicion that the first is not *bonâ fide*, he does so at his own risk as to costs. In the case before me the suggestion as to want of *bona fides* has failed, and adopting the rule as laid down by *Re Norton Iron Company*, the right course to be taken is to make the winding-up order on the first petition, *Laughton's*, because it was properly presented, and to dismiss the second

(1) 47 L. J. (Ch.) 9.

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1890
In re BUILDING SOCIETIES' TRUST, LIMITED.

petition, because there was no reason why it should have been presented at all.

It was pressed upon me in argument that Lord Justice *James*, when Vice-Chancellor, considered in *Re United Ports and General Insurance Company* (1) that the date of advertisement regulated the order of priority. On looking through that case I cannot find that he actually said anything of the kind. In that case there were three petitions before the Court on the first petition day in the term, all of them presented in the Long Vacation: the first petition presented on the 7th of October, but not advertised till the 26th; the second petition presented on the 12th of October, and advertised on the 26th; and the third petition presented on the 23rd of October, with actual notice of the other two, but advertised before them. In these circumstances the Vice-Chancellor made the winding-up order on the third petition as being the right one, and dismissed the others, not giving them their costs. There certainly are some expressions of the Vice-Chancellor which look as though he thought that the advertisement tested the priority of proceedings, but if that was his rule, it was not adopted by the late Master of the Rolls in 1877, when he decided *Re Norton Iron Company* (2). I find, too, in the report before *James*, V.C., some statements and expressions from which I infer that the Vice-Chancellor considered both the first and second petitions improper; both appear to have been friendly petitions. If I have to choose between the two authorities, I think the right rule and the fair rule is that laid down by the Master of the Rolls in *Re Norton Iron Company*.

In *In re London and Australian Agency Corporation* (3) I find there was one order on the three petitions, but the carriage of the order was given to a petitioner whose petition had been presented before though advertised after one of the other two. In that case all three petitions appeared to have been properly presented, and *Jessel*, M.R., gave the carriage of the order to the petitioner who first presented his petition; he seems to have looked on priority of presentation as the right element in a case where there were no special circumstances, yet afterwards in *In re Trades Bank*

(1) 39 L. J. (Ch.) 146. (2) 47 L. J. (Ch.) 9.
(3) 29 L. T. (N.S.) 417.

Company (1), on the 8th of December, 1877, less than a month after *Re Norton Iron Company* (2), he is reported to have adopted a different rule. In *In re Trades Bank Company*, as appears from the Weekly Notes, the Master of the Rolls had in reality only one petition before him, *Frodsham's*, though there was another petition, *Doulton's*, for winding up the same company pending in another branch of the Court, which had been presented first; an attempt was made to delay the hearing, which was not successful, and the Master of the Rolls made an order on both petitions, *Doulton* undertaking to transfer his petition to that branch of the Court, but he gave the carriage of the order to the petitioner *Frodsham* who had first advertised, and whose petition was the only one then before him. In that case he allowed the rule as to priority of advertisement to prevail, the reporter adding—I say reporter advisedly—because the Master of the Rolls never intended to overrule what he had just laid down in *Re Norton Iron Company*:—"Thus assimilating his practice to the other branches of the Court." This is not accurate.

Another authority that has been referred to is *In re General Financial Bank* (3), decided in 1882, in which *Jessel*, M.R., says (4): "Now Mr. *Burbidge*, a *bonâ fide* creditor, presented a *bonâ fide* petition, and at the time he presented it he did not know of the petition of *Ashley, Carr, & Co.*; he was therefore, according to the ordinary practice of the Court entitled to his costs up to a certain point, that is, until he was aware, as he was on the 6th of February, of the advertisement of *Ashley, Carr, & Co.'s* petition. Then in ordinary cases he ought to have stayed his hand and not gone on with his petition. A second petitioner is not justified in an ordinary case in going on with his petition, but if it turned out that the first petition was not *bonâ fide* or was collusive, he would be justified." That is a statement entirely in accordance with what he said in *Re Norton Iron Company*. I am satisfied, therefore, that the right rule to be adopted in this case is what I have already stated. Possibly if I had two petitions before me, each properly presented, I might

(1) W. N. 1877, p. 268.
(2) 47 L. J. (Ch.) 9.
(3) 20 Ch. D. 276.
(4) Ibid. 278.

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give the carriage of the order to the one that was advertised first; that is not the case I have before me. The result, therefore, is that I make the order for winding-up on the first petition, and only on the first. I give *Pooley* his share in the costs of creditors supporting a winding-up order, and the costs of his own petition up to the date of presentation, when he first had notice of *Laughton's* petition.

My clerk has just handed to me two old daily cause-lists of the 8th and 15th of December, 1877, from which I see that *In re Trades Bank Company, Frodsham's* petition, was in the Master of the Rolls' paper on the 8th of December, and that on the 15th a winding-up petition in the same company, transferred from *Hall*, V.C., was in his list. So that on the 8th he had, as a fact, only one petition, *Frodsham's*, before him.

Solicitors: *Herbert F. Oddy; W. A. Bilney; E. Todd.*

W. C. D.

CHITTY, J.
1890
March 25.

JOHNSON *v.* WILD.

[1889 J. 766.]

Landlord and Tenant—Assignment—Underlease—Rent—Common Obligation—Right of Contribution.

A lessee of land assigned part of the land to *A.* for the residue of the term, and other part to *B.* for the residue of the term, less ten days, at apportioned rents, covenanting in both cases to pay the rent due to the original lessor and to indemnify.

The lessee having become bankrupt, *A.*, on the application of the lessor and on threat of distraint, paid the whole rent under the original lease:—

Held, that as *A.* and *B.* were not liable to a common demand and there being no one entitled to sue *B.* for his share of the rent, *A.* had no right of contribution as against *B.*

SPECIAL CASE.

By an indenture of lease dated the 27th of May, 1878, and made between *Clarke* of the one part and *Minor* of the other part, *Clarke* demised to *Minor* a plot of land containing 1366 square yards, for a term of 999 years, at a yearly rent of £11 7*s.* 8*d.*

By an indenture of mortgage dated the 8th of April, 1879, and made between *Minor* of the one part and *Adams* of the other part, *Minor* assigned to *Adams* a portion of the plot of land demised by the above-mentioned indenture of lease containing 466 square yards, for the residue of the term of 999 years, subject to an apportioned rent of £3 17*s.* 8*d.*, and to a proviso for redemption on payment of the sum of £500 and interest, and *Minor* covenanted with *Adams* that he, his executors, administrators and assigns, would pay the rent of £11 7*s.* 8*d.*, and perform the covenant contained in the said indenture of lease, and would save harmless and keep indemnified *Adams*, his executors, administrators and assigns, from all damages and expenses by reason of the non-payment of the rent or the non-performance of the covenants.

By an indenture of underlease, dated the 21st of May, 1879, and made between *Minor* of the one part and *Ann Whittaker* of the other part, *Minor* demised to *Ann Whittaker* a further portion of the plot of land demised by the said indenture of lease, containing 759 square yards, for the residue of the term of 999 years, save the last ten days thereof, subject to the payment of the rent of £6 6*s.* 6*d.*, and *Minor* covenanted with *Ann Whittaker* that he, his executors, administrators and assigns would pay the rent of £11 7*s.* 8*d.*, and perform the covenants contained in the said indenture of lease and keep *Ann Whittaker*, her executors administrators and assigns indemnified against all damage on account of the non-payment of the rent or non-observance of the covenants and conditions.

By an indenture dated the 28th of September, 1880, and made between *Minor* of the one part and *Ann Whittaker* of the other part, in consideration of £118, *Minor* assigned and released to *Ann Whittaker* the yearly rent of £6 6*s.* 6*d.*, to hold the same absolutely, and released her, her heirs, executors, administrators and assigns, and the premises demised by her underlease from the covenants and conditions therein contained.

By an indenture dated the 28th of October, 1881, and made between *Minor* of the one part and *Adams* of the other part, *Minor* charged the premises comprised in the indenture of the 8th of April, 1879, with the further sum of £50 and interest.

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In February, 1878, *Minor* filed a petition for liquidation; and in February, 1882, *Adams* entered into possession of the mortgaged premises.

By an indenture dated the 2nd of August, 1887, and made between *Adams* of the one part and the Plaintiff of the other part, *Adams* assigned to the Plaintiff the mortgage debt and the plot of land comprised in the indenture of mortgage of the 8th of April, 1879, subject to the equity of redemption then subsisting.

The residue of the land comprised in the lease of the 27th of May, 1878, amounting to 141 square yards, became vested in one *Brooke*, and two cottages were built on it. The land demised to *Ann Whittaker* remained unbuilt upon, being used by her as a part of the garden attached to her residence.

Ann Whittaker died in 1888, and the Defendants were the trustees and executors of her will.

The Plaintiff, after the date of the transfer to him, continued in possession of the mortgaged premises, and the lessor having applied to him to pay the whole of the rent of £11 7*s.* 8*d.*, and in the event of non-payment having threatened to distrain on the land and buildings belonging to the Plaintiff, being the only part of the property capable of being distrained on, for the full annual rent, the Plaintiff paid the rent half-yearly, the whole of such payments from the 25th of March, 1887, to the 29th of September, 1889, amounting to £20 9*s.* 2*d.*

This was a special case, and the question submitted for the opinion of the Court was, whether the Defendants were liable to contribute any and what proportion of the rent reserved by the lease of the 27th of May, 1878, in respect of the portion of the plot demised to *Ann Whittaker* by her underlease of the 21st of May, 1879.

Romer, Q.C., and *Levett*, for the Plaintiff:—

The payment made by the Plaintiff was for the benefit of the Defendants, and this claim for contribution is founded on the clearest principles of natural justice, for as all are equally relieved it seems but just that all should contribute in proportion (1). One underlessee who has paid the whole rent and expended

(1) Story's Equity Jurisprudence, vol. i. p. 493.

money on repairs may compel the other underlessees holding under the same lease to contribute: *Webber* v. *Smith* (1).

Maclean, Q.C., and *Swinfen Eady*, for the Defendants:—

One underlessee of a portion of premises comprised in the original lease having, under a threat of distress, paid the whole rent, cannot recover from another underlessee of another portion of the premises the proportion of rent due from him as for money paid to his use: *Hunter* v. *Hunt* (2). One tenant in common of a house who expends money on ordinary repairs has no right of action against his co-tenant for contribution: *Leigh* v. *Dickeson* (3).

The right of contribution arises between co-sureties, as in that case there is a common liability; but in this case there is no such common liability, and there is no one who can sue the Defendants for their proportion of the rent; and we submit that the Plaintiff's case entirely fails.

Levett, in reply.

CHITTY, J.:—

The Plaintiff claims contribution from the Defendants in respect of the payment that he, the Plaintiff, has made for the rent under a lease for a term of 999 years, granted in 1878. The Plaintiff claims under the lessee. *Adams* took a mortgage from the lessee of part of the property, and *Adams'* security is framed in this way. He became the assign of part of the land comprised in the lease for the whole term granted by the lease; so that, in law, he was an assign of that part of the land demised, and, consequently, *Adams* remained liable to the landlord for the rent that was reserved upon the lease. *Adams* has assigned over, and the Plaintiff stands in *Adams'* shoes as assignee. *Adams*, for his protection, took a covenant from his mortgagor for the payment of the entire rent of the lease, and also a covenant for indemnity. The Defendants have a title to another part of the land comprised in the same lease, their title being derived out of the lessee's interest.

(1) 2 Vern. 103. (2) 1 C. B. 300.
(3) 15 Q. B. D. 60.

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The Defendants' predecessor took an assignment which was drawn in a different form. Instead of taking an assignment for the whole of the term granted by the original lease in the part of the land with which the Defendants' predecessor was dealing, she took an underlease, and so escaped all liability for payment of the original rent; and she also, by way of precaution, took from the original lessee a covenant to pay the rent and to indemnify her against the rent. Now *Minor*, the lessee, has got into difficulties, and he is in that impecunious position that he cannot pay the rent. I do not think it is material, but on the statements of this case it does not appear that he is discharged from payment of rent. He remains liable; and he remains liable, apparently, on those covenants which I have mentioned—the covenant to pay the rent, and the covenant to indemnify. But he cannot pay. In those circumstances the landlord has distrained for the rent, and finding that he could obtain his distress best upon that part of the land which is in the Plaintiff's holding, he has distrained, or threatened to distrain, which is the same thing, on the Plaintiff; and the Plaintiff, in order to avoid the distress, has paid the entire rent reserved by the lease of 1878; and that is the payment in respect of which he demands contribution. Now he does not demand contribution from a person who is liable to a common demand, because the Defendants are not liable for the rent; and the Defendants are not only not liable for the rent, but nobody can sue them in respect of this supposed liability unless it be the Plaintiff; whereas, in a common demand for which two persons are liable, if one pays then there is a right of contribution on the part of the one who makes the payment against the one who does not. But there is no authority for the proposition that has been now advanced. Co-sureties are liable to the principal demand, either in the whole or in part; and as between the co-sureties, there is not only the common law right of contribution, but there is the equitable right of contribution.

The most remarkable part of this case is, that this kind of question must, in fact, have arisen time after time during the centuries that this class of law has been known—a first demise, a sub-demise, and sub-demise again to the second, third, fourth,

fifth, or even tenth, degree. If I were to assent to this principle, I should have to pursue, not the first, as it were, in the series of underlessees, but I should have to go down to the end of them. The thing is absurd.

The position of the Plaintiff is, unquestionably, unfortunate. He has in this case got a person who stands on the same level as he himself does in respect of the demand—that is to say, the rent; but unfortunately that person cannot pay. He would have a right of contribution, and something much more, because he would have a right under the special covenants against *Minor*, and he need not, as against him, resort to any such device as this. But he cannot get contribution from the Defendants. I can find no authority to justify the Plaintiff's contention; and I think I should err if I said there was any principle which let in this demand. The result is, I think, the Plaintiff's case fails, and, this decision being treated as the judgment in the action, I dismiss the action with costs.

Solicitors: *Robbins, Billing, & Co.*, agents for *Johnson & Johnsons, Stockport*; *A. J. Nash*, agent for *F. & T. Drinkwater, Hyde.*

G. M.

CHITTY, J.
1890
April 18, 19.

In re MORRIS.
MORRIS *v.* FOWLER.

[1889 M. 3516]

Practice—Notice of Motion for Attachment—Service where no Appearance—Filing—Rules of Supreme Court, 1883, *Order* XLIV., *r.* 2; *Order* LXVII., *r.* 4.

A notice of motion for leave to issue a writ of attachment is sufficiently served where the party against whom the attachment is to be issued has not entered any appearance by filing with the proper officer, pursuant to Order LXVII., rule 4.

MOTION.

This was an application for leave to issue a writ of attachment against the Defendant, a trustee, for disobedience to an order directing him within seven days after service to pay a certain

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sum of money into Court. The Defendant had not entered any appearance, and the writ and statement of claim had been duly filed pursuant to Order LXVII., rule 4. The Defendant was a trustee and executor of the will of the above-named *J. G. Morris*, and it was alleged that he had misappropriated a sum of £231 5*s*.

On the 1st of March, 1890, on motion for judgment in default of defence, the Defendant was ordered within seven days after service of the order to pay into Court the said sum of £231 5*s*.

On the 3rd of April, 1890, the Defendant was personally served with the said order of the 1st of March. This order, however, was not complied with, and on the 15th of April notice of motion for leave to issue a writ of attachment was filed.

Egerton Brydges, for the motion:—

The only question is, whether service by filing under Order LXVII., rule 4, is, under the circumstances, sufficient "notice to the party" within Order XLIV., rule 2. It is admitted that personal service is not necessary, and it is a "notice" within Order LXVII., rule 4, and a notice which, under the circumstances there provided for, is properly served by filing. There is no solicitor here on the record, as there was in *Browning* v. *Sabin* (1).

[CHITTY, J., referred to *In re A Solicitor* (2), and continued:— I do not remember any instance in which leave to issue a writ of attachment has been given without notice of some kind being given to the party moved against; and Mr. *Pemberton*, the Registrar, is not aware of any such case either. At present I do not see any answer to your argument; but the matter had better stand over till to-morrow, and the Registrar will in the meantime make further inquiries.]

The matter was mentioned again, when Counsel stated that he had been unable to find any authority directly in point.

CHITTY, J.:—

Notice of motion for leave to issue a writ of attachment is well served by service upon the solicitor on the record of the party

(1) 5 Ch. D. 511. (2) 14 Ch. D. 152.

moved against, where there is a solicitor acting for such party. It is settled that it is not necessary to serve the notice of motion personally on the party to be attached, the language of rule 2 of Order XLIV. being that no writ of attachment shall be issued without leave to be applied for "on notice to the party" against whom the attachment is to be issued. In the present case, the Defendant, the party against whom the attachment is to be issued, has not appeared, and the writ and statement of claim have been filed pursuant to Order LXVII., rule 4, under which, where no appearance has been entered for a party, as is the case here, "All . . . notices . . . in respect of which personal service is not requisite may be served by filing them with the proper officer": the notice of motion in this case has been filed in accordance with this order, and the question is, whether this service is sufficient. In my opinion, this service is good and in accordance with the rules. Search has been made in the Registrar's office, at my request, to see if any precedent can be found in any way contrary to the order I am now asked to make, and I have been informed that none can be found. I therefore make the order as asked, with costs.

Solicitors: *Peacock & Goddard*, agents for *Brydges & Mellersh, Cheltenham.*

W. C. D.

NORTH, J.
1889
Dec. 14, 17, 21.

In re JOBSON.
JOBSON *v.* RICHARDSON.

[1889 J. 1030.]

Will—Construction—Vesting—"From and after."

A testator gave a house to his trustees, upon trust to permit his daughter *E.* to receive the rents thereof for her life; "and from and after her decease the same premises shall be in trust for all the children of *E.*, in equal shares, as tenants in common, on their respectively attaining the age of twenty-one years."

The will contained no direction as to the application of the rents of the house after the death of *E.*, and during the infancy of her children. *E.* had only one child, a daughter, who survived her mother, and died under twenty-one unmarried:—

Held, that, notwithstanding the use of the words "from and after," the children of *E.* did not take vested interests until they attained twenty-one.

Andrew v. *Andrew* (1) distinguished.

ORIGINATING SUMMONS by the sole trustee of the will of *Robert Jobson* to determine a question arising on the construction of his will.

By his will, dated the 1st of May, 1869, the testator appointed *Thomas Crone* to be the trustee and executor thereof; and the testator gave, devised, and bequeathed all his real estate and the residue of his personal estate unto *Thomas Crone*, his heirs, executors, administrators, and assigns, upon the trusts thereinafter declared of and concerning the same, viz., as to a specified leasehold messuage, upon trust to permit the testator's daughter *Elizabeth Jobson* to receive the rents and profits thereof for her life, "and from and after her decease the same premises shall be in trust for all the children of the said *Elizabeth Jobson*, in equal shares as tenants in common, on their respectively attaining the age of twenty-one years."

The residue of the testator's estate was given in trust for *Elizabeth Jobson*, *Esther Richardson*, and *John Jobson* (the Plaintiff), in equal shares as tenants in common. The will contained

(1) 1 Ch. D. 410.

no directions as to the application of the rents of the leasehold house during the minority of the children of *Elizabeth Jobson* after her death.

The testator died on the 18th of August, 1869. *Thomas Crone* died on the 14th of June, 1873, and on the 23rd of April, 1877, the Plaintiff was appointed trustee of the will in the place of *Crone.*

Elizabeth Jobson was married in 1870 to *William Costello.* She died on the 15th of March, 1877, intestate. *William Costello* died on the 20th of May, 1878. He did not during his life apply for letters of administration to his wife's estate, but after his death letters of administration to her estate were granted to his executor, *Michael Costello.* There was only one child of the marriage of *William* and *Elizabeth Costello,* viz., *Ada Winifred Costello,* who died on the 21st of June, 1888, aged seventeen. The Plaintiff was her administrator. The Defendant *Michael Costello* was her next of kin. *Esther Richardson* died on the 2nd of November, 1873, intestate. *Robert Richardson* was her administrator.

The Defendants to the summons were *Robert Richardson* and *Michael Costello.*

The leasehold house had been sold under a power of sale in the will, and the summons asked for a declaration that the Plaintiff, as administrator of *Ada Winifred Costello,* was entitled to the proceeds of sale of the house.

H. Terrell, for the Plaintiff:—

On the true construction of the will *Ada Winifred Costello* took a vested interest in the house on the death of her mother. The gift is to the children of *Elizabeth Jobson* "from and after" her death, *i.e.* immediately upon her death, and the subsequent words, "on their respectively attaining the age of twenty-one years," do not prevent the immediate vesting on the death of the mother. They mean "payable at twenty-one." *Andrew* v. *Andrew* (1) is in favour of this construction. Moreover, the will was made since the passing of *Lord Cranworth's Act* (23 & 24

(1) 1 Ch. D. 410, 417.

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1889
In re JOBSON.
JOBSON v. RICHARDSON

Vict. c. 145), and it must be read as if the power of maintenance conferred by sect. 26 of that Act had been actually contained in it. Consequently, the cases in which it has been held that the insertion of a power of maintenance during minority out of the income of a fund tends to shew that the infant was intended to take a vested interest in the fund, apply here. Other authorities in favour of vesting at the death of the mother are *Bree* v. *Perfect* (1); *Ingram* v. *Suckling* (2); *In re Bevan's Trusts* (3); though in those cases the construction was aided by a gift over in default of issue of the tenant for life. This is not like a case in which there is no gift except in the direction to pay to the legatee; the words are "shall be in trust" for the children of *Elizabeth Jobson*; that is equivalent to an immediate gift to the children on the death of their mother, the payment only being postponed till they attain twenty-one. If the vesting is postponed till they attain twenty-one, the testator, in the events which have happened would, but for the residuary trust, have died intestate as to this house, although the child whom he intended to benefit survived the tenant for life.

Medd, for the Defendant *Costello*, in the same interest:—

The gift to the children is an absolute gift on the death of their mother; the reference to their attaining twenty-one applies only to the period of division; the words "in equal shares," are equivalent to "to be paid and divided to and among them" on their respectively attaining twenty-one: *Williams* v. *Clark* (4); *Farmer* v. *Francis* (5). Moreover, the house is completely severed from the remainder of the testator's estate, and this indicates an intention to dedicate the house completely to the children of *Elizabeth Jobson*, whether they attain twenty-one or not: *Saunders* v. *Vautier* (6).

The trust is for the children as a class, and in such a case the Court favours early vesting: *M'Lachlan* v. *Taitt* (7); *Williams* v. *Haythorne* (8).

(1) 1 Coll. 128.
(2) 7 W. R. 386.
(3) 34 Ch. D. 716.
(4) 4 De G. & Sm. 472.
(5) 2 S. & S. 505.
(6) Cr. & Ph. 240.
(7) 2 D. F. & J. 449.
(8) Law Rep. 6 Ch. 782.

Skelton Cole, for the Defendant *Richardson* :—

The gift to the children is clearly contingent on their attaining twenty-one. In *Williams* v. *Clark* (1) there were the words "equally to be divided." In *Saunders* v. *Vautier* (2) a separation of the fund as from the death of the testator was necessary in order to carry out the gift of the *corpus*. Here the severance was required only for the purpose of paying the rents to the tenant for life.

H. Terrell, in reply, referred to *Branstrom* v. *Wilkinson* (3).

1889. Dec. 21. NORTH, J. (after stating the facts, continued) :—

The question is whether the only daughter of *Elizabeth Jobson*, who survived her mother, took a vested interest in the leasehold house, notwithstanding the fact that she died under twenty-one. If she did, the house will go to her next of kin; if she did not, the house will pass under the residuary trust in the will. The will contains no direction as to the application of the income arising from the house during the interval between the death of the tenant for life and the attainment of twenty-one by her children, and no indication of the testator's intention as to the vesting of the interests of the children can be derived in that way. The maintenance clause contained in sect. 43 of the *Conveyancing Act*, 1881, no doubt applies, but it cannot throw any light on the construction of the will. In my opinion the clause would apply equally, whether the gift to the children be vested or contingent. The question is whether the words "from and after" the death of *Elizabeth Jobson* amount to a complete dedication of the house to her children upon her death, whether they live to attain twenty-one or not. In my opinion, the words do not amount to such a complete dedication. The expression "from and after" the death of a person to whom a life interest is given does not, I think, mean from that time and from no other; it only means "subject to the interest of the tenant for life." That this is the true meaning is, I think, clear from these considerations. Suppose that, instead of a child surviving her mother and then dying

(1) 4 De G. & Sm. 472. (2) Cr. & Ph. 240.
(3) 7 Ves. 421.

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under twenty-one, she had attained twenty-one and had then died in the lifetime of her mother, if the gift to children is only to take effect "from and after" the death of the mother, that child, though she had attained twenty-one, would take no interest whatever in the house. It seems to me impossible to hold that a construction which would produce such a result can be the right construction. I think *M'Lachlan* v. *Taitt* (1) is a strong authority for holding that children who attained twenty-one in the lifetime of their mother would take vested interests which could not be divested by their subsequent deaths in her lifetime. In my opinion "from and after" the death of the mother only means "subject to her life interest," and does not operate to confer a vested interest on a child who did not live to attain twenty-one, the gift being to the children "on" their respectively attaining twenty-one. *Andrew* v. *Andrew* (2), which was cited as an authority in favour of vesting on the death of the mother, is easily distinguishable from the present case. Several considerations upon which the Court relied there do not exist here. There the testator devised land to *T.*, during his life, and from and after his decease to his eldest son, if he should have arrived at the age of twenty-one, or so soon as he should arrive at that age; and in default of his having a son, then over. *T.* survived the testator, and died leaving an eldest son, who was a minor. The Court of Appeal held that on the death of *T.* his eldest son took an estate in fee, liable to be divested on his death under twenty-one, with an executory devise over in that event to *T.* in tail. In coming to this conclusion the Court was strongly influenced by the wish to avoid the extremely improbable construction that the infant son, who was to take the whole interest in the property at twenty-one, was to lose the whole of the income during his minority. Moreover, in that case there was a gift over in default of the tenant for life having a son. There is no indication that the Court would have arrived at the same conclusion had there been nothing more in the will than the words "from and after."

Another class of cases, such as *Bree* v. *Perfect* (3), was relied

(1) 2 D. F. & J. 449. (2) 1 Ch. D. 410.
(3) 1 Coll. 128.

on, but in those cases there was a gift over in the event of the tenant for life dying without leaving issue, which is quite sufficient to distinguish them from the present case. Then Mr. *Medd* relied upon *Williams* v. *Clark* (1). There the testator bequeathed £2000 to trustees, upon trust to pay the income to his daughter for her life, and from and after her decease to pay the income to her husband for his life, and, from and after the decease of the daughter and her husband, and the survivor of them, to pay and divide the £2000, and the income thereof, to and among all and every the children of the daughter, "*if more than one equally to be divided between and among them*, share and share alike, as and when they shall attain their several and respective ages of twenty-one years." Vice-Chancellor *Knight-Bruce* held that the first direction to pay and divide the £2000 amounted to an absolute gift to the children, and that the subsequent words (above placed in italics) only prescribed the age of twenty-one as the time of payment. He said that the construction which he had been asked to adopt, viz., that the gift to the children was contingent upon their attaining twenty-one, would involve striking twelve words (the words above placed in italics) out of the will. This he declined to do, and he held that those twelve words, being in the will, must have a meaning given to them. But it is clear, and I think it was not disputed, that, if those words had not been there, the interests of the children would have been contingent on their attaining twenty-one. If those words had been wanting the words of the will would have been as nearly as possible identical with those of the present will, and therefore, if *Williams* v. *Clark* applies at all here, it is an authority to shew that the interests of the children are contingent on their attaining twenty-one. *Farmer* v. *Francis* (2) is to my mind entirely distinguishable from the present case, on the ground that in it there was an original gift to all the issue, child or children of the testator's daughter, as should be living at the decease of the survivor of his wife and daughter (who were successive tenants for life) equally among them, if more than one, followed by the separate direction "to be divided, share and share alike, when

(1) 4 De G. & Sm. 472. (2) 2 S. & S. 505.

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and as they shall respectively attain the age of twenty-four years."

Then it is said, that in the present case the trust fund is completely severed from the rest of the testator's estate, and that when that is so the Court always leans to early vesting, and for this purpose *Saunders* v. *Vautier* (1) is relied on. There the testator bequeathed to his trustee all the *East India* Stock which should be standing in his name at his death, upon trust to accumulate the income thereof until *D.* should attain twenty-five, and then to pay or transfer the principal, together with the accumulated income, to *D.*, his executors, administrators, or assigns, absolutely. The testator had £2000 *East India* Stock standing in his name at his death, and Lord *Cottenham* held that *D.* took an immediate vested interest in the stock, though he was a minor at the death of the testator, and that the stock, with the accumulations, must be transferred to him on his attaining twenty-one. In that case there was a clear separation of the fund from the rest of the estate, and an express appropriation of it, with a direction to accumulate the income. There is no similar direction in the present case, nor do I find any similar appropriation of the fund. The trust is not for the children of *Elizabeth Jobson* in the first instance, but it is to permit her to receive the income for her life. There is no further segregation or appropriation of the fund, but only a trust from and after her death for all her children in equal shares on their respectively attaining twenty-one. It is said that there is a separation of the fund, because the children take vested interests; and that they take vested interests because the fund is separated. A more complete argument in a circle I cannot conceive.

Then it is said, that, if a child of *Elizabeth Jobson* died under twenty-one leaving issue, the issue would take no benefit from the gift, if their parent did not attain a vested interest. The answer to this argument is, that the issue of *Elizabeth Jobson's* children take nothing at all under the will. Suppose there were six children of *Elizabeth Jobson*, and five of them died under twenty-one, the sixth attaining twenty-one, then, if they all took

(1) Cr. & Ph. 240.

vested interests, five-sixths of the fund would go to their father, if he were living, and only one-sixth to the child who attained twenty-one. Having regard to all these considerations, I can find no reason for holding that a child of *Elizabeth Jobson*, who survived the tenant for life, but died under twenty-one, took a vested interest in the fund.

Solicitors: *Indermaur & Brown*, agents for *F. Harle, Chester-le-Street; Maples & Co.*

W. L. C.

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[1888 G. 545.]

Mortgage—Foreclosure—Successive Incumbrances—Annuitant — Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 15—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 12—*Form of Order.*

The Plaintiffs in a foreclosure action were first mortgagees; the second incumbrancer was a jointress; the Plaintiffs were the third mortgagees; there were several subsequent mortgagees. An order was made giving the jointress six months to redeem; in case she did redeem, giving three months to the Plaintiffs, as third mortgagees, to redeem subject to the jointure, and a third period of three months to the subsequent incumbrancers, but if she did not redeem giving them a second period only of three months.

Liberty to apply was reserved to persons redeeming in respect of conveyance to trustees for them.

THIS was a foreclosure action. The Plaintiffs were the secretary and trustees of the *West of England Fire and Life Insurance Company*. The subject-matter of the action was an estate dealt with by a private Act of Parliament passed in 1885, "*Lord Haldon's Estate Act*, 1885." The Act confirmed the then existing charges on the estate and modified the then existing settlements affecting the property in question.

The Defendants to the action were the trustees of the property under the Act; Lord *Haldon*, the tenant for life; the Hon. *Laurance William Palk*, an infant, the first tenant in tail in remainder; the Dowager Lady *Haldon*, and a number of persons claiming to be puisne incumbrancers.

The incumbrances on the property were:—First, a mortgage to

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the Plaintiffs, dated February, 1841, to secure £35,000 and interest. Secondly, a mortgage to the Plaintiffs dated May, 1841, to secure £50,000 and interest. Thirdly, a jointure of £1500 a year settled by an indenture of 1845, upon the Dowager Lady *Haldon* charged upon the *Haldon* estate, and some other property most of which had since been released from the jointure. Fourthly, a mortgage to the Plaintiffs, dated 1868, to secure £15,000 and interest, and subsequently a number of mortgages to various Defendants which had not been proved, and the respective priorities of which had not been ascertained. The whole of the £85,000 secured by the two first mortgages was due; £3200 had been paid off out of the £15,000 secured by the indenture of 1868.

Cozens-Hardy, Q.C., and *Bramwell Davis*, for the Plaintiffs:—

The proper order now to make is a foreclosure order giving the puisne incumbrancers one period of redemption only, the rule of the Court as now settled is, except a special case is positively made out for separate periods, only to give one period: *Doble* v. *Manley* (1); *Platt* v. *Mendel* (2); *Coleman* v. *Llewellin* (3).

In this case, as the subsequent incumbrancers have not shewn their priorities or even proved their incumbrances, it would be impossible to give them separate periods for redemption; but inasmuch as the Plaintiffs hold a mortgage next in priority to the jointress (the first person who can redeem), they wish, as they are entitled, to have a second period to redeem her. We ask that in case the jointress does redeem under sect. 15 of the *Conveyancing Act*, 1881, amended by the Act of 1882, s. 12, our debt of £85,000 and the legal estate may be conveyed to a third person, and that it may be ordered that we be at liberty to redeem her by paying back what she shall have paid and all arrears of her jointure, and that we may resume the priority we have in respect of the £85,000 and what we shall have paid her, leaving her to take the second place in respect of future instalments of her jointure.

If the assignment and conveyance is made under the *Con-*

(1) 28 Ch. D. 664. (2) 27 Ch. D. 246.
(3) 34 Ch. D. 143.

veyancing Acts to a trustee either in the interest of the Plaintiffs or Lady *Haldon*, it would be right that it should be to some one subject to the jurisdiction in this action—to some one made party, or who submits to the jurisdiction.

[NORTH, J.:—Take it in this way. Let the order stand in the usual form as if the section did not exist, but take liberty to apply to have the conveyance and assignment made to trustees instead of the party named in the order. I do not deprive the mortgagee of the benefit of the section, but I only keep control over the way it shall be worked out.]

Herbert Lake, for Lady *Haldon*:—

The proper judgment to make is in the form given in *Parry* v. *Parry* (1). When Lady *Haldon* has redeemed, she will have a right to consolidate all her charges, and put them in what order she pleases, and the Plaintiffs can only redeem against her subject to her annuity.

Frank Evans, for a subsequent incumbrancer:—

This is a case in which a sale should be directed.

[NORTH, J.:—I do not see how I can direct a sale now; there is nothing to shew the value of the property. My refusal to do it now will not fetter the parties, who can always apply until foreclosure.]

Frank Evans, *Henry Terrell*, *E. S. Ford*, *Church*, *Dauney*, and *F. Thompson*, for subsequent incumbrancers:—

This is a case where successive periods of redemption ought to be allowed. The amount of the first charges is so large, that an incumbrancer wishing to redeem cannot possibly raise the money necessary without some time. He cannot, on the other hand, be expected to raise the money on a mere chance. The fact that the mortgages are not strictly proved; and the fact that the order of priorities has not been ascertained, need cause no practical delay, for if the matter is allowed to stand over for a few days they can agree as to their priority and give formal proof of their charges: *Mutual Life Assurance Society* v. *Langley* (2).

(1) *Seton* on Decrees, 4th Ed. p. 1146.

(2) 32 Ch. D. 460.

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Vernon Smith, for trustees under the *Haldon Estate Act*.

Chadwyck Healey, for the infant tenant in tail in remainder.

NORTH, J.:—

The tendency of the Court now is certainly much greater than it was to prevent foreclosure suits continuing for years, with successive opportunities for redemption given to the parties; ordinarily it gives one period in the first instance and no more.

The case which lays down what I understand to be the law on the subject at present, is *Doble* v. *Manley* (1), where Mr. Justice *Chitty* said he had consulted with Mr. Justice *Kay* and Mr. Justice *Pearson*, and they were all unanimously of opinion that where the defendants did not appear, one time only should be fixed for redemption, whether the statement of claim alleged that they were "entitled," or only that they "claimed to be entitled" to incumbrances. To fix several successive periods was to make a decree as between co-defendants, which should not be granted except upon the request of a defendant. If any subsequent mortgagee appeared and claimed to have successive periods fixed, the Court would have to consider whether he was entitled to them. Applying that case to the present, in that case the defendants did not appear. In the present case there are a good many of them, at any rate, that do appear. But what then? They appear, and some request to have successive foreclosures. Then, to apply that judgment, it is for them to shew that they are entitled to this. No doubt if they can make a case shewing it is right that successive periods should be given, the Court can do it; but, as it was put in the case cited, they are the persons to point out why it should be done, and, I think, to entitle them to such an order they must put the Court in possession of materials upon which it can make the order they ask. In the present case there are a great number of Defendants, and their priorities are certainly not admitted, and the mortgagees have not proceeded to prove their securities. I disclaim altogether the duty, if each had proved his security, to proceed to sort

(1) 28 Ch. D. 664.

them out in the decree, and to make a decree giving successive periods for redemption, based upon my investigation of their respective securities. Of course I could not do that. No doubt if one had the dates, *primâ facie*, in the absence of anything else, that would be their order of priority; but it would not always be so, because there may be tacking or consolidation, or something of that kind. It is absolutely impossible for me now to make any declaration as to the priorities of the parties.

Then I have asked in vain for any authority that shews I can direct an inquiry as to what their priorities are, and, when that has been answered, make, on further consideration for the first time a decree for foreclosure according to the priorities so ascertained by an inquiry in Chambers. I am not in a position to do it. The case relied on by counsel for the later incumbrancers seems to me, as far as I can judge from such a slight examination as I can give it here, to be an authority directly against their contention instead of in favour of it.

This is a case in which I ought to adopt the general practice of the Court at the present day, in the absence of special circumstances, and ought not to give the Defendants separate periods for redemption.

As the Plaintiffs, however, in their capacity of fourth mortgagees, ask for a further period of redemption—and as that is what all those behind them wish (except that it is not going so far as they want), and it is for their benefit, because it gives them longer time—I will give the Plaintiffs a further period of three months, and give the subsequent mortgagees a third period of three months.

As regards the right of the Plaintiffs to redeem the jointress if she pays them off, I do not see my way to giving such a special direction as Mr. *Cozens-Hardy* asks for, and for this reason. If the Plaintiffs are redeemed the jointress will have paid them £85,000; she will then stand in the position of first mortgagee; she will then have the right to have the first mortgages assigned, I will not say necessarily to any party she may name, because difficulties may arise if they are assigned to a person outside the suit, but her right to have the charges kept alive in some way is absolutely clear, and it is not necessary at present to consider

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how; but, assuming the charges are kept alive for the benefit of the jointress, when she has paid them off, then the Plaintiffs come forward again as fourth mortgagees, and what they ask me to do is to direct that the first and second mortgages shall be transferred to them, or some nominee of theirs, by the jointress, subject to their paying to her all that she has paid to the first and second mortgagees, and also of course her own costs and all arrears of her jointure, but without making any provision for the jointure itself; and it is said that she will be in the same position as now, she will be jointress subject to the £85,000. But as the jointress has a right to redeem in priority to the fourth mortgagees, then she might have a right to say, "Hand back to me what you have compelled me to transfer to you, and transfer it to me." That may go on from time to time, and I do not see the end of it.

What the Plaintiffs are entitled to as fourth mortgagees is to have a transfer by the jointress of all the property to them subject to her jointure, in the same way as was decreed in the case of *Parry* v. *Parry* (1) with respect to an annuity, which seems much the same thing. It is said it would be a hardship on the Plaintiffs, who have clearly the two first mortgages, to put the jointress over them. Supposing that the jointress had commenced proceedings for foreclosure and redemption she might have redeemed the present Plaintiffs as first and second mortgagees, and then the Plaintiffs as fourth mortgagees would clearly be entitled to redeem her. It may be that in that case she would have to transfer to them, and to part with the securities which they, calling on her to redeem, were entitled to call for. But then she might be in a difficulty, because she was the person who as Plaintiff had set the ball rolling. In the present case it is the Plaintiffs who have done that, and if they insist on their right to take away from her the property she has acquired by redeeming them, it seems to me they can only do it subject to the charge in her favour which is admittedly prior to them. Therefore I do not see my way to make any order as between them, excepting that upon the Plaintiffs, as fourth mortgagees, paying off the jointress all that shall be found due upon taking

(1) *Seton* on Decrees, 4th Ed. p. 1146.

the account, which will include all arrears, then she should convey to them subject to the jointure.

If the jointress does not redeem she will be foreclosed; there will then be an account of what is due to the Plaintiffs on all their mortgages, and the others will be foreclosed unless they pay in three months; so there will be a second period in that case instead of a third.

Note.—The minutes provided, that the jointress should have a period of six months from the date of the Chief Clerk's certificate as to what should be due to the Plaintiffs within which to redeem; that, in case she did not redeem, the subsequent incumbrancers should have one period of three months from the date of a fresh certificate as to what should be due to the Plaintiffs within which to redeem; but that, in case the jointress did redeem, the Plaintiffs should have a period of three months from the date of a certificate as to what should be due to the jointress within which to redeem subject to the jointure; and that the subsequent incumbrancers should have a further period of three months from a certificate as to what should be due to the Plaintiffs or the jointress, as the case might be, within which to redeem.

Solicitors for Plaintiffs: *Wood, Biggs, & Nash,* agents for *H. M. James, Exeter.*

Solicitors for Jointress: *Lake, Beaumont, & Lake.*

Solicitors for Trustees: *Simpson, Hammond, & Richards.*

Solicitors for Tenant in tail in remainder: *Carlisle, Unna, & Rider.*

Solicitors for subsequent Incumbrancers: *Finney, Thomas & Co.; E. J. Rickards; C. B. Dalton; G. S. & H. Brandon; Burrows, Barnes, & Pears; J. C. Stogdon.*

D. P.

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Jan. 30; Feb. 4.

BERRIDGE v. BERRIDGE.

[1888 B. 4727.]

Principal and Surety—Co-sureties—Counter-security given by Principal Debtor to one Co-surety—Payment of Principal Debt by all Co-sureties—Right to Participate in Counter-security.

One of several co-sureties, who obtains from the principal debtor a counter-security against the liability which he has incurred under the contract of suretyship, being, as was decided in *Steel* v. *Dixon* (1), bound to bring into hotchpot for the benefit of his co-sureties whatever he receives by virtue of the counter-security:—

Held, that, when by means of the counter-security the surety has been repaid what he has paid on account of the principal debt, and has shared the amount thus received by him with his co-sureties, he will be again entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise, and so on until the whole of the payments made by the co-sureties on account of the principal debt have been refunded, or the value of the counter-security has been exhausted.

Five sureties jointly and severally guaranteed to a banking company the balance owing to them by a customer on his current account, to the extent of £2000. Afterwards the principal debtor deposited with one of the sureties a policy of insurance on his own life, to secure that surety against all liability in respect of the suretyship. The principal debtor became bankrupt, owing more than £2000 to the banking company, and on their demand the five sureties paid them £2000 under the guarantee. The principal debtor afterwards died, and the policy money was received by the surety with whom the deposit had been made:—

Held, that, inasmuch as that surety was bound to bring into hotchpot for the benefit of his co-sureties whatever he received out of the policy money in payment of the amount which he had paid under the guarantee, the deposit in effect enured for the benefit of all the co-sureties to the full extent of the principal debt, and that the policy money must accordingly be applied in repaying to the five co-sureties the amounts which they had respectively paid under the guarantee.

SPECIAL CASE for the opinion of the Court.

In March, 1880, *Samuel Berridge* was indebted to the *Leicestershire Banking Company* on an overdrawn account, and on the 9th of March, 1880, five sureties for him, viz., *William Berridge* of *Sibbertoft*, *James Berridge* (one of the Plaintiffs), *William*

(1) 17 Ch. D. 825.

Berridge of *Upton*, *William Gilbert*, and *Alice Gilbert*, joined in a letter of guarantee to the bank, by which they requested the bank to advance moneys to *Samuel Berridge* from time to time as he might require the same, "and in consideration thereof we jointly and severally undertake to repay you any amount that may be due to you on the balance of his current account, or on any other account or security whatsoever, not exceeding the sum of £2000, whenever required by or on your behalf so to do."

On the 6th of April, 1880, *William Berridge* of *Sibbertoft* deposited with the bank the title-deeds of some land belonging to him, by way of security for the overdraft of *Samuel Berridge* with the bank, upon the terms of a memorandum, dated the 6th of April, 1880, signed by the said *William Berridge*, and a receipt of the same date signed by the agent of the bank. By the memorandum, which was addressed to the bank, *William Berridge* of *Sibbertoft* declared that the deeds "are deposited with you as a security for all sums of money now or hereafter to become due from my brother *Samuel Berridge* to the banking company, either upon banking accounts, or in any other manner whatsoever, including interest, commission, and all other usual banking charges." And *William Berridge* undertook, upon request, to execute to the bank a mortgage of the property for the better securing all sums of money intended to be thereby secured, such mortgage to contain a power of sale and all other usual clauses and covenants. The receipt for the deeds, signed by the agent of the bank on the same day, stated that they were deposited by *William Berridge* of *Sibbertoft* "as security for his brother *Samuel Berridge's* account when in excess of £2000."

Prior to his death (in 1887) *Samuel Berridge* had deposited with *William Berridge* of *Sibbertoft* two policies of assurance on the life of *Samuel Berridge*, each for the sum of £1000, with bonus additions. The exact date of the deposit was not known.

William Berridge of *Sibbertoft* died on the 6th of December, 1882. By his will he appointed *James Berridge* and *John Earl* (the Plaintiffs) executors thereof, and they proved the will. By the will he bequeathed his furniture and other household effects to his wife, and also a legacy of £100. And he bequeathed all his moneys, securities for money, and all the residue of his

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personal estate to his trustees, upon trust for sale and conversion as therein mentioned, and to hold the proceeds, and also his ready money, upon trust, in the first place, thereout to pay his debts, including mortgage debts (if any), funeral and testamentary expenses, and the above legacy, and to hold the then residue upon the trusts therein mentioned.

By a deed, dated the 28th of August, 1884, and made between *Samuel Berridge*, of the one part, and the Plaintiffs, of the other part, after recitals to the effect that *William Berridge* of *Sibbertoft* became surety for the payment of certain moneys which might be owing by *Samuel Berridge* to the bank, and that *Samuel Berridge* by way of indemnity deposited with the said *William Berridge* the two policies above mentioned on his own life, and that he by his will appointed the Plaintiffs executors thereof, and that *Samuel Berridge* had at the request of the Plaintiffs agreed to assign the policies in manner thereinafter appearing; it was witnessed that, for the consideration aforesaid, *Samuel Berridge*, as beneficial owner, did thereby assign unto the Plaintiffs the said two policies, whereby the sum of £2000 was assured to be paid to the executors, administrators, or assigns of *Samuel Berridge* at the end of six months after his death, subject to the annual premiums therein mentioned, together with all bonuses which might be added to the policies, or either of them, to hold the same unto the Plaintiffs, their executors, administrators, and assigns, "provided always that, if the said *Samuel Berridge* shall at any time hereafter release or cause to be released the estate of the said *William Berridge*, deceased, from all liability in respect of the said suretyship, then the said policies shall be reassigned unto the said *Samuel Berridge*, at his cost."

The deed provided for the payment of the premiums on the policies by the Plaintiffs, in case *Samuel Berridge* should not pay them, and that he should repay the Plaintiffs any moneys which they should pay for that purpose, with interest, and that in the meantime the moneys so expended, with interest thereon, should be "an additional charge on the policies and premises for the time being subject to this security."

On the 20th of January, 1886, a receiving order was made against *Samuel Berridge*, and on the 4th of February, 1886, he

was adjudged a bankrupt. At the date of his bankruptcy he was indebted to the bank in a sum of £3842 14*s.*, in respect of which a proof was made by them in the bankruptcy, and they received a dividend on their debt, after which there remained due to them £3334 9*s.*

On the 6th of July, 1886, the bank applied to the guarantors, under the guarantee of the 9th of March, 1880, to pay the sum of £2000 secured thereby, and the Plaintiffs, on behalf of the estate of *William Berridge* of *Sibbertoft*, the Plaintiff *James Berridge*, on his own behalf, *William Berridge* of *Upton*, *William Gilbert*, and *Alice Gilbert*, respectively, thereupon paid to the bank the sum of £2000 in the following proportions, viz.: the Plaintiffs, as executors of *William Berridge* of *Sibbertoft*, £400; *James Berridge*, £500; the Defendant, *Mary Alice Berridge*, as representative of *William Berridge* of *Upton*, £500; and *William Gilbert* and *Alice Gilbert*, £600.

The bank afterwards called upon the Plaintiffs, as executors of *William Berridge* of *Sibbertoft*, to pay the sum of £1334 9*s.* the balance then remaining of the debt due to the bank from *Samuel Berridge*, and the Plaintiffs paid the said sum to the bank accordingly on the 9th of November, 1886.

After the bankruptcy of *Samuel Berridge* the Plaintiffs paid the premiums on the policies as they became due, and they expended £165 16*s.* 8*d.* for that purpose.

Samuel Berridge died in 1887, without having obtained a discharge in his bankruptcy. His estate had been wound up, and the trustee in the bankruptcy had been released. The trustee was a Defendant.

William Berridge of *Upton* had died intestate, and his widow, the Defendant *Mary Alice Berridge*, had obtained administration to his estate.

William Gilbert and *Alice Gilbert* had both been adjudicated bankrupt, and the Defendant *William Henry Chamberlain* was the trustee in bankruptcy of their respective estates.

The sum of £2490 was received by the Plaintiffs on the 18th of June, 1888, in respect of the two policies.

The questions submitted for the opinion of the Court, were:—

1. Whether the said sum of £2490 should be applied (1) in

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payment to the Plaintiffs, as executors of *William Berridge* of *Sibbertoft*, of the sums expended by them in respect of premiums on the policies, with interest thereon, and in payment of the Plaintiffs' costs, charges, and expenses in respect of the policies and of the deed of the 28th of August, 1884; (2) in payment to the Plaintiffs, as executors of *William Berridge* of *Sibbertoft*, of the sums of £400 and £1334 9*s.* respectively with interest thereon, and (3) whether the residue of the said sum of £2490 should be paid to the Defendants and the Plaintiff *James Berridge*, in his own right, or some or one of them.

Or,

2. How otherwise the said sum of £2490 ought to be dealt with and distributed.

3. How the costs of this application ought to be paid or borne.

Cozens-Hardy, Q.C., and *Dibdin*, for the Plaintiffs:—

When one co-surety obtains from the principal debtor a counter-security against his liability, he is bound to give his co-sureties the benefit of that security *pari passu*. After the estate of the Plaintiffs' testator has been repaid out of the policy money what it has paid to the bank in respect of the testator's further security, his executors will be entitled to retain out of the balance of the policy-money the amount which the estate has paid to the bank on the original guarantee. The co-sureties will then be entitled to participate in the sum so retained. The testator's estate will then become entitled to retain out of the policy-money the amount which has been handed over to the co-sureties; they will be again entitled to participate, and this process must be repeated till all the co-sureties have been repaid in full, or the policy-money is exhausted: *Steel* v. *Dixon* (1); *In re Arcedeckne* (2). The whole of the policy-money will be in fact exhausted, and there will be no surplus for the estate of the principal debtor.

Ingle Joyce, for the trustee in the bankruptcy of the principal debtor:—

The deed of August, 1884, shews that the policies were de-

(1) 17 Ch. D. 825. (2) 24 Ch. D. 709.

posited by the principal debtor, only for the purpose of releasing the personal estate of the Plaintiffs' testator from liability in respect of the suretyship. Nothing is said about his real estate. He did not incur any personal liability under the equitable mortgage to the bank of April, 1880. *James Berridge* was, as executor, party to the deed of August, 1884, and yet it contains no reference to the co-suretyship. That deed had nothing to do with the relations between *William Berridge* of *Sibbertoft* and his co-sureties.

The claim of the Plaintiffs is an attempt to extend the doctrine of *Steel* v. *Dixon* (1). That case only shews, that, if one co-surety obtains a counter-security from the principal debtor, he must bring into hotchpot for the benefit of his co-sureties what he receives from that source—that is, if the co-surety is repaid by means of his security the amount which he has paid under his guarantee, he must share with his co-sureties the amount which he has received in repayment. But he is not then entitled to obtain anything more out of the counter-security. A person who becomes surety for a debtor at the request of a co-surety cannot call on that co-surety for contribution: *Turner* v. *Davies* (2); *De Colyar* on Guarantees (3). The argument for the Plaintiffs really comes to this—that, if one co-surety gives an indemnity to another, the indemnity will enure for the benefit of all the co-sureties to the full extent of the principal debt. There is no authority for such a proposition. The point was not decided, and in fact it was not raised, in *Steel* v. *Dixon*.

[NORTH, J.:—I was counsel for some of the defendants in that case, and I could never understand why the plaintiffs did not carry their claim to that extent.]

The indemnity to the Plaintiffs' testator was not part of the original contract of suretyship; it was given afterwards.

There is nothing to shew that the other co-sureties have made any claim against the Plaintiffs for indemnity.

The other Defendants were served, but they did not appear at the trial.

(1) 17 Ch. D. 825. (2) 2 Esp. 478.
(3) 2nd Ed. p. 313.

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Cozens-Hardy, in reply:—

Steel v. *Dixon* (1) shews, that the fact that the indemnity was given after the contract of suretyship is immaterial.

The policies were deposited as an indemnity against "all liability in respect of the suretyship." This obligation will not be satisfied by giving the Plaintiffs a sum of money which they are not entitled to keep for their testator's estate, but which they must share with the co-sureties. The point is covered in principle by *Steel* v. *Dixon*.

The £1334 9s. is entitled to priority over the £2000.

NORTH, J. (after stating the original guarantee of the 9th of March, 1880, the memorandum of deposit, and the receipt of the 6th of April, 1880, continued):—

I do not see anything in the memorandum which shews that *William Berridge* thereby undertook any personal liability, by reason of which he can be sued in debt in respect of the amount covered by that security. If the security had been given by the principal debtor who was receiving the advance from the bank, the matter would, in my opinion, have stood in a totally different position. But the liability of the surety must be measured by that which is expressed in the written document, which alone constitutes the security; and here he merely deposits the documents as security. That, in my opinion, does not amount to a contract that he is also to be personally liable for the repayment of the debt. Then there is the receipt for the deeds signed by the agent for the bank; and I think the terms of the deposit are contained in the two documents, and I must read the two as if they were one. The second document makes it clear what the nature of the deposit was. It was to be a security for the surplus of the debt to the bank in excess of the £2000. After that *Samuel Berridge* deposited with *William Berridge* of *Sibbertoft* two policies of assurance for £1000 each. There is nothing to shew at what date the deposit was made. It must, I think, have been after the original agreement of suretyship of the 9th of March, 1880; but whether it was between the 9th of March, 1880, and the 6th of April, 1880, or whether it was subsequently

(1) 17 Ch. D. 825.

to the 6th of April, 1880, I have no means of judging. Then came the deed of the 28th of August, 1884. [His Lordship read the deed, and continued:—] *Samuel Berridge* became bankrupt; he did not pay anything to the bank. He has since died, and a sum of £2490 has been received by the Plaintiffs in respect of the policies. The question is, how that money is to be applied. The £2000 was paid to the bank by the five sureties in unequal proportions. The Plaintiffs, as executors of *William Berridge* of *Sibbertoft*, paid their proper proportion of £400; *James Berridge* paid £500; *Mary Alice Berridge*, as representative of *William Berridge* of *Upton*, paid £500; and *William Gilbert* and *Alice Gilbert* paid only £600 between them, which was less than their proper contribution. Of course the construction of the deed of August, 1884, cannot be affected by the actual course of events afterwards. For the purpose of considering the construction of that deed, let me suppose that the bank had claimed from the Plaintiffs, as executors of *William Berridge* of *Sibbertoft*, payment of the whole debt due from the principal debtor, and that they had then paid the whole amount; what in that case would have been their right as against the policy moneys? The policies were to be re-assigned to *Samuel Berridge* only if he should at any time thereafter release the estate of *William Berridge*, deceased, "from all liability in respect of the said suretyship." Now, at the moment of which I am speaking, all liability in respect of the suretyship would, in one sense, have been at an end, because the principal debt would have been paid off by the surety. But it would be absurd to suppose that, so soon as one of the sureties had paid off the principal debt, the deposit by way of security to that surety was to be at an end. Of course the meaning is, that the policies are to be a security to the surety so as to relieve him from liability, not only in the sense of paying off the principal debt, but by repaying to him whatever he has had to pay in order to satisfy the liability of the principal debtor. Therefore, in the case which I have put, it is clear that *William Berridge's* estate would have been entitled to receive back the £2000 which it had paid in satisfaction of the security. That event did not, however, happen, and, in fact, *William Berridge's* estate has paid only £400.

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But now, the policy money being divisible, the question is, in what shares it ought to be divided. The other co-sureties now claim to have the benefit of the security which was taken by *William Berridge* of *Sibbertoft* upon the policies belonging to the principal debtor. It is said that they have never yet made any such claim. There is no reason why they should have made any such claim until the present moment, because nothing has yet been repaid to any one out of the estate of the principal debtor, and it is only now, when the policies have been realized and the money is forthcoming, that the question how it ought to be divided arises for any practical purpose. When it is suggested that £400 should be paid to the Plaintiffs, the other co-sureties say, "If that sum is to be paid to the Plaintiffs, we claim to share in it." Thereupon, the Plaintiffs reply, "If that £400 is to be divided among all the co-sureties, the payment of £400 will not be a complete indemnity to our testator's estate," and, therefore, the question is really at large, what is to be done with this money for the purpose of indemnifying the Plaintiffs? I think it is quite right that the premiums should first be re-paid, with interest, and then the costs in connection with the equitable mortgage and the costs of the action. The next claim is the £1334 9*s*., which the Plaintiffs paid in respect of the equitable mortgage which their testator gave. It is clear that they paid that sum out of his personal estate in order to redeem the deposited deeds, because under his will they were bound to apply his personal estate in redeeming the deeds. That was, therefore, a proper payment, and the Plaintiffs are entitled to receive the £1334 9*s*. out of the proceeds of the policies. Then the Plaintiffs are also entitled to the £400 which they paid to the bank on account of the £2000; and when that £400 has been paid to the Plaintiffs or retained by them, it cannot be applied solely in satisfying them; but it must, according to the doctrine of *Steel* v. *Dixon* (1), be shared between them and the other co-sureties. Then, will the Plaintiffs be entitled to receive anything more? In my opinion they will, because otherwise the estate of their testator will not have been released "from all liability in respect of the suretyship." It will only have been

(1) 17 Ch. D. 825.

repaid one-fifth part of the £400 which it has paid to the bank, because the rest of the £400 will have gone to pay the co-sureties, who, on the principle of *Steel* v. *Dixon* (1), had a legal right to share in the £400. That being so, something more must be paid to the Plaintiffs. There must be paid to them such a further sum as will make up to them that which has been taken away from them by reason of the claim of the other co-sureties to share in the £400. Then, again, that further sum, when it has been paid to them, will have to be distributed in a similar manner, and therefore, if the rights were worked out in that way, there would be successive payments made out of the policy money to the Plaintiffs until the rights of all the co-sureties had been satisfied, and then only the Plaintiffs would be in a position to say that they had got the £400 to which they are entitled under the deed of August, 1884.

In my opinion, this result necessarily flows from the doctrine of *Steel* v. *Dixon*, though I do not think that the point was actually decided there. In that case, the plaintiffs, for some reason I could never understand, limited their claim to a share of the first payment received by their co-surety by means of his counter-indemnity, and did not ask to share in any subsequent payments made to him. They did not claim to share in the whole of the proceeds of the counter-security, but only to the extent of the £400. I think the principle of the decision would have entitled them to more, if they had asked for it, and I think it entitles the co-sureties in the present case to the relief which I have mentioned.

There would be no further question if the proceeds of the policies were sufficient, after the prior payments which I have mentioned, to pay both the £1334 9*s.* and the £2000 in full; but those proceeds are not sufficient. The question, therefore, arises whether the £1334 9*s.* ought to be paid in priority to the £2000? I do not see any reason why it should. The deposit of the policies was made to release the estate of the Plaintiffs' testator from all liability in respect of his suretyship for the principal debtor, and I can find nothing in the deed of August, 1884, which makes a distinction between his liability under the memorandum of deposit and his liability under the original guarantee.

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That being so, I think the surplus of the policy money, after making the prior payments which I have mentioned, must be applied, so far as it will extend, rateably in satisfying the £2000 and the £1334 9*s*.

Cozens-Hardy, Q.C., for the Plaintiffs:—

A question arises with regard to those co-sureties who have paid more than the others. Two have paid £500 each; the Plaintiffs as executors have paid £400; and *William* and *Alice Gilbert* have paid £600 between them—probably each £300. I submit that, after payment of the premiums and costs, so much of the balance of the policy moneys as is apportioned to the £2000 should be applied, first, in paying to those sureties respectively who had paid more than £300 the sum required to bring their payments down to £300 each, then that the residue should be divided rateably among the five.

NORTH, J.:—

I think that is the right mode of division.

The following is a copy of the indorsement on counsel's brief:—

Declare that the policy moneys ought to be applied (1) in payment to the Plaintiffs of the premiums paid by them with interest at 4 per cent.; (2) in payment of the Plaintiffs' costs as mortgagees; (3) in payment of the costs of all parties of this action as between solicitor and client; (4) that the balance be apportioned rateably between the £2000 and the £1334 9*s*., and that the part apportioned to the £2000 is to be applied (*a*) in repaying £100 to each of the sureties who have paid £500; (*b*) in repaying £100 to each of those sureties and also to the Plaintiffs as executors; (*c*) the residue is to be divided rateably between all the five sureties.

Solicitors: *Bridges, Sawtell & Co.*, Agents for *Howes, Percival, & Ellen, Northampton; W. Murton, Solicitor to the Board of Trade.*

W. L. C.

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[1888 C. 3534.]

Patent—Action to restrain Threats of Legal Proceedings for Infringement—Action for Infringement—"Due diligence" in commencement and prosecution—Discontinuance—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 32.

In order that an action by the owner of a patent for the infringement of his patent should be "prosecuted with due diligence," within the meaning of the proviso to sect. 32 of the *Patents, Designs, and Trade Marks Act,* 1883, so as to exclude the operation of the former part of that section, it is not necessary that the infringement action should be prosecuted up to judgment. The Plaintiff will not lose the protection of the proviso by reason of his discontinuing the action before trial upon discovering that he has no cause of action.

Semble, that, *primâ facie,* if a threats action under sect. 32 is commenced against the owner of a patent by an alleged infringer, the Defendant will not be wanting in "due diligence" if he waits a reasonable time for the delivery of the statement of claim, in order that he may, if possible, raise the question of infringement by means of a counterclaim in the threats action, instead of incurring the expense of an independent action for infringement.

A threats action under sect. 32 was commenced against the owner of a patent by an alleged infringer on the 22nd of September, 1888. The threats were contained in a trade circular which had been circulated on the 15th of September. On the 6th of December, the Defendant in the threats action commenced an action against the Plaintiff for infringement of the patent. On the 8th of February, 1889, a statement of claim was delivered in the threats action, and on the 9th of March the statement of defence was delivered. On the 13th of May a statement of claim was delivered in the infringement action, the time for its delivery having been several times extended by consent. On the 6th of November the patentee discovered, by means of the report of an expert made under an order for inspection in the threats action, that there had been no infringement of the patent, and on the 7th of November he gave notice of discontinuance of the infringement action, and paid the Defendant's costs of it. At the trial of the threats action,

Held, that the infringement action had been commenced and prosecuted with "due diligence," and that, consequently, the proviso to sect. 32 applied, and the Plaintiff in the threats action had no cause of action under that section.

TRIAL of action to restrain threats by a patentee of legal proceedings against persons infringing his patent.

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The Defendant *Morris Hart* was a manufacturer of toilet paper, and he was the owner of a patent (1885, No. 9106) for "improvements in apparatus for unreeling, perforating, and re-reeling paper into rolls for toilet and other purposes."

The Plaintiff *W. W. Colley* also carried on business as a manufacturer of toilet paper. He had formerly been in the employment of *Hart*.

On the 15th of September, 1888, the Defendant *Hart* issued the following trade circular, and sent it to (among other persons) some of *Colley's* customers: "It has come to my knowledge that *W. W. Colley*, late in my employ, is offering to the trade perforated toilet rolls, which is an infringement of my patent, 1885, No. 9106.

"I further learn that *W. W. Colley* is not only offering this paper in breach of my patent rights, but also that he is infringing my trade mark, a copy of which is inclosed, and which is duly registered in pursuance of the Act. This is well known to Mr. *Colley*, he having been in my employ until April, 1888.

"His proceedings are, therefore, a distinct breach of my rights under both patent and trade mark, and I think it right to inform you that I intend to commence proceedings forthwith against every person whom I find in any way dealing in any perforated toilet paper manufactured in breach of my patent rights under the above patent or under my trade mark."

On the 22nd of September, 1888, *Colley* issued the writ in this action against *Hart*, claiming thereby an injunction to restrain the issue of the above circular, or any circulars, letters, or advertisements containing threats against purchasers of the Plaintiff's goods, and damages for injury to the Plaintiff's trade by the issue of the said circulars.

On the 3rd of October the Plaintiff gave notice of motion before the Vacation Judge for an injunction. When this motion came on for hearing, the Vacation Judge thought it was not proper Vacation business, and he ordered the motion to stand over until the 2nd of November. On that day the motion was heard by Mr. Justice *North*, and an interlocutory injunction was granted.

On the 6th of December, 1888, *Hart* commenced an action

against *Colley* for the infringement of the patent. On the 8th of February, 1889, *Colley* delivered a statement of claim in the threats action, thereby denying that he had infringed *Hart's* patent; and he claimed an injunction to restrain the Defendant from issuing the above circular, and from threatening the Plaintiff or his customers, or otherwise interfering with the Plaintiff's trade. On the 9th of March, 1889, the statement of defence in the threats action was delivered. On the 13th of May, 1889, the statement of claim in the infringement action was delivered, the time for delivery having been several times extended by consent.

On the 30th of January, 1889, *Hart* issued a summons in the threats action for inspection of the process employed by *Colley*, and ultimately, after a good deal of correspondence, an order was made on the 13th of June, 1889, for inspection by Mr. *G. B. Ellis*, an expert, who was to report to the Judge. On the 9th of July, 1889, *Ellis* made a report in writing to Mr. Justice *North*, of the result of his inspection, stating that, in his opinion, *Colley's* process was not an infringement of *Hart's* patent.

On the 1st of August, 1889, an order was made that the counsel and solicitors on each side should see the report. The report was handed first to *Colley's* solicitors, and was not handed over by them to *Hart's* solicitors until the 6th of November, 1889. On the 7th of November, 1889, they gave notice of discontinuance of the infringement action, which was accordingly struck out of the list, and *Hart* paid *Colley's* taxed costs of it.

Colley's action now came on for trial.

Aston, Q.C., and *Roger W. Wallace*, for the Plaintiff:—

The interim injunction already granted ought now to be made perpetual, and an inquiry as to damages should be directed. By discontinuing his action for infringement, the Defendant has admitted that there was no infringement of the patent by the Plaintiff *Colley*, and consequently, that there was no ground for the threats. In addition to his right of action under sect. 32 (1)

(1) Sect. 32 provides: "Where any person claiming to be the patentee of an invention, by circulars, advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain

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of the *Patents Act*, 1883, *Colley* has a right of action at common law because the Defendant acted maliciously.

Cozens-Hardy, Q.C., and *J. C. Graham*, for the Defendant:—

No action can be maintained under sect. 32. The Defendant *Hart* is protected by the proviso; he commenced and prosecuted his infringement action with due diligence. It is not necessary that the action should be prosecuted to a successful result, and the Defendant *Hart* cannot be in a worse position because he discontinued his action, as soon as he found that he could not possibly succeed in it, instead of incurring the useless expense of a trial. The dates shew that all the steps in the action were taken with due diligence up to the time of discontinuance. The present action can be maintained, only if *Colley* can shew that the threats were made maliciously. If they were made in the *bonâ fide* belief that the patent was being infringed by *Colley*, even though that belief was ill-founded, no action will lie. There must be actual malice: *Sugg* v. *Bray* (1).

Aston, Q.C., and *Roger W. Wallace*, for the Plaintiff:—

The infringement action was not commenced with due diligence, and it was not prosecuted with due diligence. It must be prosecuted so as to justify the threats, *i.e.* to a successful result: *Herrburger* v. *Squire* (2). A man has no right to utter such threats speculatively. *Hart* ought to have ascertained the truth before he commenced his own action. He was bound to prove that he had a valid patent, and that it had been infringed by *Colley*: *Challender* v. *Royle* (3).

Cozens-Hardy, in reply:—

[NORTH, J.:—I only wish to hear you as to the effect of the

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an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

(1) 2 Rep. Pat. Cas. 223, 243.
(2) 5 Rep. Pat. Cas. 581.
(3) 36 Ch. D. 425, 438.

discontinuance. I think your action was commenced in due time, and prosecuted with due diligence down to the date of the discontinuance.]

If the infringement action had been dismissed at the trial, the proviso to sect. 32 would have applied. Why should the Plaintiff be worse off by reason of the discontinuance? If the Legislature intended that the patentee should be bound to establish at the trial the validity of his patent and the fact of infringement, why did they not say so expressly? The Court cannot insert such words in the proviso. Indeed, if that was the intention, the proviso ought not to have been introduced at all. There are observations in the judgment of Lord Justice *Cotton* in *Challender* v. *Royle* (1) which are in favour of the view that it is not necessary that the infringement action should be carried to a successful result. The object of sect. 32 was to prevent the owner of a patent from making vague threats, and to compel him to bring the question of the validity of his patent and its infringement before the Court for decision.

Feb. 19. NORTH, J.:—

I postponed giving my judgment yesterday, not because I felt much doubt about the case, but because it raises a point which, so far as I know, is not as yet covered by any decision or *dictum*. [His Lordship read the circular of the 15th of September, 1888, and continued:—]

There is no evidence before me at present that that circular was published maliciously, and, therefore, the Plaintiff has no right of action in respect of it, unless the right is given by sect. 32 of the *Patents Act*, 1883. I think it is clear that that circular would have given the Plaintiff a right of action under sect. 32, but for the proviso at the end. That circular, then, having been issued on the 15th of September, on the 22nd of September *Colley* commenced the present action, which I will call for convenience the "threats action," and which, as I have said, would have been clearly warranted by sect. 32, if there had been no such proviso. On the 6th of December *Hart* commenced an action against *Colley* for infringement of his patent, and, if that action

(1) 36 Ch. D. 438, 439.

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was "commenced and prosecuted with due diligence," it prevents *Colley* from having any right of action under sect. 32, because that section does not apply to a case in which an action for infringement of the patent is commenced and prosecuted with due diligence by the person making the threats.

The first question, therefore, is whether the action was commenced with due diligence. [His Lordship referred to the dates above stated, and continued:—]

It is said that the action was not commenced with due diligence, and *Herrburger* v. *Squire* (1), before Mr. Justice *Charles*, is relied upon on that point. In my opinion, it is quite impossible to fix any precise time within which such an action should be commenced; it must depend entirely upon the circumstances of the particular case. The action might well, under one set of circumstances, be commenced with due diligence, if it were commenced at a certain time after the threats action, whereas under other circumstances it would clearly not be commenced with due diligence if it were commenced after a lapse of exactly the same time. It is impossible to lay down any general rule. Upon that point, however, the Plaintiff relied upon *Herrburger* v. *Squire*. The order of events in that case, as stated by Mr. Justice *Charles* in his judgment, was this. There was some threat made by the defendant in 1885, which, as I understand, Mr. Justice *Charles* put out of consideration altogether. Then on the 21st of October, 1886, the defendant published a threat in a circular to the trade, and Mr. Justice *Charles* says (2): "At the time he issued that circular he must have become aware, I suppose, that the plaintiffs, amongst other persons, were selling the damper with the arrangement of the arm attached to the body of the damper; but he took no steps. He states that he intends to take legal proceedings; but he took none, and a whole year passed away." Mr. Justice *Charles*, therefore, proceeds upon the footing that the defendant had known of the existing state of things for a year, that he had made threats, but for a year had taken no proceedings. Then Mr. Justice *Charles* goes on: "The next step which was taken by him was this: on the 1st of September, 1887, he published a circular which is to the same effect. Now what did the defendant

(1) 5 Rep. Pat. Cas. 581. (2) 5 Rep. Pat. Cas. 594.

do? All September passed, and nothing was done. All October passed, and nothing was done by the defendant. But something was done by the plaintiffs. The plaintiffs, on the 12th of October, issued their writ under sect. 32. Even then the defendant did nothing; and it was not until the 14th of November that he instituted two actions against two persons who had purchased the plaintiffs' check-action with this armed damper, and then, in due time, in December, he counter-claimed." The learned Judge asks whether that was due diligence, and says that he cannot say it was. Then he proceeds: "He says he intended to do it in 1886, but he does absolutely nothing. I must assume that he must have known that sales were going on of these armed dampers in *England*; otherwise I do not see why he should have issued the circular of the 21st of October, 1886. He does nothing for nearly a twelvemonth. At the end of the twelve months, in September, 1887, he returns to the charge, and he gives another notice in the *Music Trades Journal* that he intends to commence an action in the Chancery Division of the High Court of Justice against any one infringing; but he does nothing; and it is not until more than a month after the plaintiffs have commenced their action under sect. 32 that he does institute two actions against two other persons for the infringement of his patent. I cannot think that is due diligence, and, therefore, I do not think that he has brought himself within the proviso. . . . He has not, having regard to all the circumstances of the case, in my opinion, with due diligence commenced and prosecuted an action for the infringement of his patent." Of course, the facts of that case are different from those of the present case, but I am referred to it for the purpose of finding some principle which would assist me in deciding the present case. I cannot, however, find anything which really helps me, because the learned Judge there relied very much upon the fact that the infringement had been going on for fourteen months to the knowledge of the defendant, who did not take any proceedings. That is a totally different state of things from that which I have now before me.

I find great difficulty in attempting to fix within what time an action for infringement must be brought, in order that it may be

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"commenced with due diligence." Let me put this case. Suppose a man gets his patent complete at the end of 1885. I assume that it is a good patent and a valuable patent, that it is perfectly certain there will be infringers, and that he is on the look-out for them. At the end of 1886, he finds that *A.* is infringing the patent, and he writes a warning letter to him, which letter, according to the decided cases, would be a "threat." *A.* receives it and submits. He may say, I did not know of your patent, or I did not know I was infringing it, or he may for various other reasons submit unconditionally. The threat is not prosecuted, no proceedings are taken against *A.*, for the best of all reasons—there is nothing to sue him about, because he has submitted unconditionally. At the end of 1887, the patentee finds that *B.* is infringing the patent, and he is about to take proceedings against him, when *B.* dies insolvent before he can commence an action. At the end of 1888, the patentee finds that *C.* is infringing; he warns *C.*, and *C.* submits. Again, at the end of 1889, the patentee finds that *D.* is infringing, and he writes a warning letter to him. *D.* does not submit, but replies by commencing at once a threats action, whereupon the patentee immediately issues a writ for infringement against *D.* *D.* then says, You are too late; your threats have been going on for three years; for no less than three years you have known that there were infringers of your patent, and you have never proceeded against them, and it is only now, after the lapse of three years, that you endeavour to set up an action commenced by you now as an answer to my threats action, which is founded, not only upon your letter to me, but on your threats to *A.*, *B.*, and *C.*, all of which, unless followed in due time by an action of infringement, give ground of action to me. In such a case as that I cannot doubt for a moment that the action against *D.* would have been commenced in due time, although the threats had been continued for the space of three years. This illustration shews, how impossible it is to fix any definite time within which such an action must be brought.

The only case, so far as I know, in any way bearing upon the question of time is *Challender* v. *Royle* (1), but I think I should

(1) 36 Ch. D. 425.

be doing great injustice to the learned Judges who decided that case if I supposed that they intended to lay down any rule as applicable to all cases. I refer to the case only by way of illustration. Lord Justice *Cotton* said (1): "Was it" (the action) "commenced with due diligence? Mr. *Bousfield* contended that the action must be commenced with due diligence from the time when the defendant first knew that the plaintiff was doing what the defendant alleges to be an infringement. I cannot agree with that view. In my opinion, an action must be held to be commenced with due diligence, if commenced within a reasonable time after the threats have been made, for the threats are the only matter complained of. Now, assuming the threats to have been made in March, the action against the *Manchester Plumbing Company* was in my opinion commenced with due diligence after the time when the defendant first issued these threats, for I think that the interval between March and June is not an unreasonable time for a man to take to consider whether he should bring an action in respect of a supposed infringement of his patent." That is, three months is a reasonable time to take. Now I do not say that decides the present case, but it is an illustration, shewing what Lord Justice *Cotton* thought under the circumstances would be a reasonable time within which to bring an action. But, if that were a test to be applied to the present case, the threats were uttered on the 15th of September, and the infringement action was commenced on the 6th of December, that is, in less than three months.

There is another test, and it is this. We have often known judges speak of the inconvenience of having patent litigation duplicated by there being an action for infringement, and another action for threats brought before another judge—perhaps in a different division of the Court—at any rate, two actions instead of one. In the present case an action for threats was commenced. An action for infringement must be brought within a reasonable time—"with due diligence." Again, I am not attempting to lay down a rule applicable to all cases, but, as a *primâ facie* rule applicable to most cases, I do not think it can be said that a man would be guilty of undue delay, if (the Plaintiff

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in the threats action being the alleged infringer) he waited to see whether he could not combine the two causes of action in one action, in other words, if he waited a reasonable time for the delivery of the statement of claim, and then brought his counter action, not separately, but by means of a counter-claim in the threats action. In the present case an interlocutory injunction was granted in the threats action on the 2nd of November, and, in my opinion, the Defendant was justified in waiting for some time, in order to see whether he could not raise his claim for infringement in that action, instead of commencing a new one; in other words, he was justified in waiting for some time, at any rate till the statement of claim was delivered, to see whether he could not raise his claim for infringement by means of a counter-claim. Now, although the threats action was commenced by *Colley* on the 22nd of September, it was not until the 8th of February following that the statement of claim was delivered. That was two months after *Hart* had commenced his action. I cannot see that there was any undue delay in *Hart's* waiting to see whether he could not raise his defence by counter-claim, when I find that the statement of claim in *Colley's* action was itself not delivered until two months after *Hart* had commenced his action. I come, therefore, to the conclusion that there was no want of due diligence on the part of *Hart* in commencing his action.

But then the proviso to sect. 32 requires, not only that the infringement action should be commenced with due diligence, but also that it should be prosecuted with due diligence. As regards the prosecution, I must draw a line between what happened before, and what happened after, the date of the discontinuance, that is, the 7th of November, 1889. Up to that time the action was going on. Is there anything to shew that it was not being prosecuted with due diligence? I have nothing before me but the dates of the proceedings taken in the action, and I must deal with the matter simply upon those dates. I find that *Hart's* statement of claim was delivered on the 13th of May, 1889, which seems a long time after the issue of his writ. But, for reasons which I must take to have been sufficient, the time for delivering the statement of claim was extended down to

that date. Then the defence was put in on the 27th of May. From that time onward there were certain proceedings in the threats action. An order for the inspection of *Colley's* process had been made and it was considered necessary that there should be a report by an expert, and steps were taken to obtain it. I cannot find anything to shew that these proceedings, down to the time of discontinuance, were in any way wanting in due diligence. Nor was that point really raised by *Colley's* counsel, neither of whom could put his finger upon any point in the course of the proceedings at which he could say that there had been undue delay. But they say, and this is their real point upon the question of want of due diligence, that there was not due diligence in prosecuting the action from the 7th of November onward, because it was then discontinued. A report had been made by an expert, upon which *Hart* came to the conclusion that he could not prosecute his action with success, and at that point, therefore, he discontinued it, and paid *Colley's* costs of it. Was that discontinuance a want of prosecution with due diligence? Mr. *Aston* argues that the proviso to sect. 32 means, that the person making the threats shall prosecute an action for infringement to a successful result. In the first place, the section does not say so; and I should find great difficulty in understanding it, if it did. I hardly know what "a successful result" would be, considering the multiplicity of points which can be raised in a patent action. The argument comes to this, that the proviso should be read as if it had said, "with due diligence commences and prosecutes, and recovers judgment in an action for infringement." There are no such words in the section, and it would be a strong thing for me to add them—to treat the section as containing such words. The point cannot have escaped the attention of the Legislature. Nothing would have been easier than to have inserted those words, if it had been intended that the section should be read in that way. I do not find any such words there, and I do not feel at liberty to add them. But I do not believe that this was the intention of the section, and I think it might produce a very unjust result if those words were in it. Suppose, for instance, that an action for infringement were commenced with due diligence, and that, while it was being prosecuted with due

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diligence, the infringer died insolvent; it would be impossible then to prosecute such an action to a successful result. If the infringer were insolvent, you could not sue his executors. No benefit would have been gained by his estate which the plaintiff could follow as against the executors, and the personal tort would have come to an end. It would be impossible for the plaintiff to go on with the action then.

To put another case, suppose the infringer became bankrupt with very large liabilities, and very small assets, could it be said that an action, commenced with due diligence and prosecuted with due diligence down to that time, failed to be such an action as satisfied the proviso to sect. 32, because it was not prosecuted to judgment after the bankruptcy. I do not think it would be possible to say that.

Then, again, the Defendant to the action for infringement might submit and pay damages. Can it be said that a man has not commenced and prosecuted an action with due diligence, because, having got all which he could get by it, he has not gone on to recover judgment in it? I do not think it is possible to construe the section as meaning, that the Plaintiff is bound to prosecute the action to judgment, although the full benefit which he seeks in the action has been offered to him before judgment.

But, in truth, the failure to succeed in the action for infringement would not necessarily be a fair test whether the Plaintiff was justified or not in making his threats. The patent might be perfectly good, and yet the action for infringement might fail. The Plaintiff might have lost important witnesses by death; or his witnesses might fail to attend at the trial; and he might not succeed in recovering judgment solely upon that ground. On the other hand, his witnesses might attend, and it might turn out that their evidence did not come up to what he had been led to expect. His case might break down through the infirmity of his witnesses. Again, there might be serious questions whether what the Defendant had done was or was not in fact an infringement; the jury might hold that it was; the Divisional Court and the Court of Appeal might take the same view; but ultimately the House of Lords might say that it was not an infringement. It

would be very strange if the right of the Defendant to utter the threats in the first instance was to be tested by the final result of an action for infringement.

I may give another illustration. Suppose the person who brings the action for infringement is not the original patentee, but an assignee of the patent, and that among the defences set up by the defendant is this, that he was not infringing the patent, because a license to use it had been granted to him by the patentee, before the assignment was made to the plaintiff. The assignee might know nothing of that alleged license; he might not believe in its existence; he might ask the patentee about it, and be told by him that it was untrue that he had granted any license to the defendant. The plaintiff might, thereupon, go on with his action; but at the trial it might turn out that the patentee had not told him the truth, and that the defendant in fact had a license from the original patentee, and was justified in what he was doing. It is evident that there might be very many cases in which failure to succeed in an action for infringement would be a very unfair test whether the plaintiff was justified in making threats, founded upon his having a good title to the patent. Not only, therefore, do I not see my way to add to the proviso such words as to make it read thus, "with due diligence commences and prosecutes and recovers judgment in an action for infringement of the patent"; but I am satisfied that the addition of such words might lead to great injustice.

I hold, therefore, that, in order that an action for infringment should come within the proviso, it is not essential that it should be prosecuted to recovery of judgment by the Plaintiff, and that a man may, within the meaning of the proviso, "with due diligence have commenced and prosecuted" the action, although the judgment goes against him; and, consequently, that the action, being within the proviso, prevents there being any right of action under the earlier part of sect. 32.

If then *Hart* had commenced his action with due diligence, and prosecuted it with due diligence down to trial, and then it had been found that there had been no infringement, and so he had failed in the action, in my opinion the action would none

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the less have been within the proviso to sect. 32, so as to prevent a cause of action arising to *Colley* under that section. How, then, does the matter stand? *Hart* ascertained in November, 1889, that his action for infringement must fail; he was so advised, and he thereupon, like a wise man, at once discontinued his action, and paid the costs of it. In my opinion, he was under no obligation, in order that the action should be a good defence under the proviso, to prosecute a hopeless action until trial, and then to undergo the fate of having it dismissed with costs. On the contrary, so soon as he discovered that the action was hopeless, I think it was his duty to put an end to it at once, and not to go on with it to trial. I do not say that this duty is one of very perfect obligation; the performance of it might be difficult to enforce; but still I think the Plaintiff in such circumstances owed a duty to his adversary, not to proceed with the litigation against him after he had ascertained that it was hopeless, and I think also he owed a duty to the Court, not to waste its time in the trial of an action in which he felt that he could not possibly succeed.

I think he stands in exactly the same position by discontinuing a hopeless action before trial as that in which he would have stood, if he had prosecuted the action to trial, and had then failed. As failure at the trial would not, in my opinion, have prevented the action from being within the proviso to sect. 32, I think the discontinuance before trial does not put the Plaintiff *Hart* in any worse position than if he had gone on to trial. I hold that the infringement action which *Hart* brought is within the proviso, and that it prevents *Colley* from having a cause of action under sect. 32.

The action was then tried upon the issue, whether the Defendant had uttered his threats maliciously.

Upon the evidence,

NORTH, J., held that no malice had been proved, and he dismissed the action.

Solicitors: *Truefitt & Gane; Linklater, Hackwood, & Co.*

W. L. G.

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[1888 H. 4590.]

Trade-mark—Registration—Infringement—Registration of Mark for one Class of Goods—Right to prevent Use of Mark for another Class of Goods—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 62, 65, 70, 77—*Trade Marks Registration Act,* 1875 (38 & 39 *Vict. c.* 91).

The registration of a trade-mark for one class of goods does not entitle the registered proprietor to prevent another person from using the mark in connection with goods included in a different class.

The Plaintiff registered a trade-mark for the goods included in Class 6 in the first schedule to the Rules under the *Trade Marks Registration Act,* 1875—that is, "Machinery of all kinds, and parts of machinery, except agricultural machines included in Class 7."

In his application for registration, the Plaintiff stated that the article in connection with which the mark was to be used was "a toilet requisite, being a machine to hold a reel of perforated paper."

The Plaintiff sold both the machines and the reels or rolls of paper, which were intended to be used together. The two things could, however, be purchased separately. When a roll of paper had been used up, another could be fixed in the machine. The Plaintiff did not place the mark upon the machine, but he placed it on the wrappers in which his rolls of paper were sold. The Defendant sold similar rolls of paper with the same mark on the wrappers:—

Held, that, paper not being included in Class 6, the registration did not entitle the Plaintiff to prevent the Defendant from using the mark in connection with his rolls of paper; but on the evidence an injunction was granted to restrain the Defendant from passing off his goods as the Plaintiff's.

TRIAL of action brought to restrain the Defendant from infringing the Plaintiff's trade-mark.

On the 23rd of May, 1883, the Plaintiff, who traded as the *Patent Toilet Requisite Company,* and who sold the paper which is known as "Perforated toilet paper" in reels or rolls, applied under the *Trade Marks Registration Act,* 1875, which was then in force, for the registration of a trade-mark, which was subsequently registered.

The application was for registration in respect of the class of goods included in Class 6 in the first schedule to the Rules made

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under the Act of 1875, that is, "Machinery of all kinds, and parts of machinery, except agricultural machines included in Class 7."

In the application for registration, the article in connection with which the trade-mark was to be used was thus described: "A toilet requisite, being a machine to hold a reel of perforated paper."

The Defendant was engaged in the same trade as the Plaintiff. The statement of claim alleged that "the Defendant has, prior to the issue of the writ in this action and since the registration, sold large quantities of perforated paper contained in wrappers, and has issued large numbers of circulars and advertisements, whereon there was printed the registered trade-mark of the Plaintiff."

The Plaintiff claimed an injunction "to restrain the Defendant from continuing to infringe the said registered trade-mark."

By his statement of defence the Defendant said, "If the Defendant has at any time used in his business marks similar to the Plaintiff's alleged trade-mark (which the Defendant does not admit), then the Defendant says that the Plaintiff's alleged trade-mark is registered for a different class of goods from those mentioned in the statement of claim."

The Defendant was ordered to deliver particulars of his defence, and, in the particulars delivered in pursuance of this order, he said, "The trade-mark is registered in the class for iron, and not in respect of paper articles, the subject-matter of this action."

The Plaintiff did not place his trade-mark upon the metal machine or holder in which the rolls of paper were intended to be fixed, but upon the wrappers in which the rolls of paper were inclosed. The rolls were sold separately from the holder, though they were intended to be used together. When a roll had been used up, a new one could without any difficulty be placed in the holder.

The Defendant placed the mark which he used in the same way upon the wrappers in which the paper which he sold was inclosed.

Cozens-Hardy, Q.C., and *J. C. Graham*, for the Plaintiff.

Aston, Q.C., and *Roger W. Wallace*, for the Defendant:—

The Plaintiff has not registered his trade-mark in such a way as to entitle him to prevent the Defendant from using it in the way in which he has used it. The Plaintiff's mark is registered only in respect of the goods included in Class 6. The Plaintiff does not use the mark in connection with the machine which holds the rolls of paper, but he uses the mark, as does also the Defendant, in connection with the rolls of paper. Paper is not included in Class 6, but in Class 39, and the registration does not prevent the Defendant from using the mark, except in respect of goods included in Class 6. Sect. 65 of the Act of 1883 provides (as did sect. 2 of the Act of 1875) that "a trade-mark must be registered for particular goods or classes of goods," and in *Edwards* v. *Dennis* (1), it was held, that the registration of a trade-mark in respect of the whole of a class of goods would not prevent another person from using it in respect of goods included in that class in connection with which the registered owner did not use the mark, and, indeed, that the registration must be limited to those goods only in connection with which he was using the mark. The principle of that decision extends to the present case. The object of requiring that the registration shall be limited to particular goods or classes must be, to prevent the owner of a trade-mark from acquiring a monopoly of it for all kinds of goods when he uses it only in connection with some.

Cozens-Hardy, Q.C., and *J. C. Graham*, in reply:—

The Plaintiff's machine is not a mere machine, but it is intended to be used only for a specific purpose—that is, for holding the rolls of paper. The two things always go together, and the use of the mark upon the wrappers in which the rolls of paper are sold is practically and in substance a use of it in connection with the machine. The machine would be of no use alone.

The Act does not say that, when a trade-mark has been registered for one class of goods, any other person may use it in respect of any other class.

It is not necessary that a trade-mark should be placed on the

(1) 30 Ch. D. 451.

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goods themselves; it would be sufficient to place it on the outside of boxes containing the goods, or upon a label attached to the goods, or in circulars or advertisements. Physical connection with the goods is not necessary: *Singer Machine Manufacturers* v. *Wilson* (1). The Plaintiff puts his mark on that which is inseparably connected with the machine.

NORTH, J.:—

I do not think the Plaintiff is entitled to sue in respect of this trade-mark. Assuming that he has a right to an injunction restraining the Defendant from imitating his goods, which is a different head of relief from that in respect of the trade-mark, there appears to me to be an insuperable difficulty with regard to the trade-mark—viz., that the Plaintiff has registered his mark in Class 6 only, and he does not complain of the sale by the Defendant of any goods which come within that class. [His Lordship stated the facts relating to the registration, and referred to the allegations in the pleadings, and continued:—]

Mr. *Cozens-Hardy* says that the Act requires registration of a trade-mark, and that, when once the registration has been made, the registered owner is entitled to sue in respect of the use of that mark by any other person. Mr. *Hardy* relies on sect. 77 of the Act of 1883, which corresponds with sect. 1 of the Act of 1875, and provides that "A person shall not be entitled to institute any proceeding to prevent or to recover damages for the infringement of a trade-mark unless, in the case of a trade-mark capable of being registered under this Act, it has been registered in pursuance of this Act, or of an enactment repealed by this Act, or, in the case of any other trade-mark in use before the 13th of August, 1875, registration thereof under this part of this Act, or of an enactment repealed by this Act, has been refused." It is quite true that without registration the Plaintiff could not sue at all. But there is nothing in the section to say that, when once he has registered the mark, the owner is entitled to sue in respect of every use of it. The section is simply negative, imposing registration under the Act as a condition precedent, a necessary preliminary, to the right to sue.

(1) 3 App. Cas. 376, 388.

Then the question arises, What is registration under the Act? Sect. 65, which corresponds with sect. 2 of the Act of 1875, says, "A trade-mark must be registered for particular goods or classes of goods." Therefore, a general registration in respect of all goods could not be effected. Then sect. 62 says, "The comptroller may, on application by or on behalf of any person claiming to be the proprietor of a trade-mark, register the trade-mark"; and it adds: "The application must be made in the form set forth in the first schedule to this Act," and "The application must state the particular goods or classes of goods in connection with which the applicant desires the trade-mark to be registered." The form F. given in the schedule, as well as the subsequent modification of it, given in the second schedule to the Trade Mark Rules, 1883, contains a request that the mark may be registered in specified classes of goods. It points, therefore, to particular goods or classes of goods. The form in use under the Act of 1875 was substantially to the same effect.

Then, again, sect. 70, which corresponds with sect. 2 of the Act of 1875, says: "A trade-mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the particular goods or classes of goods for which it has been registered, and shall be determinable with that goodwill." It is true that the Plaintiff's mark was registered under the Act of 1875; but I have referred to the sections of the Act of 1883, and to the existing rules, merely for convenience. The provisions of the two Acts and of the two sets of rules are for the present purpose practically the same. I do not see what is the object of requiring registration for particular goods or classes of goods, if, by registering a mark in respect of one class of goods, the owner can acquire a right to sue in respect of all classes; for that is what I understand the argument to be. I think the express object of requiring the application for registration to be made in respect of particular goods and classes of goods was, to confine the registration and the right to sue in respect of the registration to the goods thus indicated.

There is another thing which bears out this view, I mean the rule known as the "three marks rule," which was originally framed by the Commissioners of Patents under the Act of 1875,

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and has now been adopted by sect. 74 of the Act of 1883. That rule related only to old marks, *i.e.*, marks in use before the 13th of August, 1875, and it provided that identical or similar old marks should not be capable of being registered in relation to the same kind of goods by more than three persons, and that, if the same mark had been used by more than three persons for the same kind of goods, it must be treated as common to the trade in those goods. It would have been utterly useless to adopt such a rule, if, when there were three similar old marks registered in respect of particular goods, or a particular class of goods, a person who had registered a similar old mark in respect of a different class of goods could prevent the use of his mark in respect of the class of goods for which the three marks had been registered.

Then, again, the common practice is in accordance with the same view. In turning over the leaves of the *Trade Marks Journal* we constantly find four or five, or more, trade-marks all exactly alike registered in respect of different classes of goods. Why is that? Because by common consent everyone understands that the right to registration under the Act is in respect of the particular goods or classes of goods for which the registration is obtained.

I am surprised to find that this point has never yet been expressly decided, for it must have arisen a great many times. But I find that in *Edwards* v. *Dennis* (1) observations were made by the Judges which, as it seems to me, point exactly the same way. In that case it was held that a person could not register a mark with respect to all the goods comprised in a particular class, unless he had used the mark in respect of all those goods, and that, when a mark had been registered with respect to a particular class of goods, but had been used only in connection with certain goods in that class, the registration must be rectified by limiting it to those goods only in connection with which the mark had been used. Now it would be absurd to say that, if a man registers a mark for Class 1, in respect of particular goods comprised in that class, he cannot sue in respect of other goods in that class, and yet that, without any other registration, he can sue in respect of all the goods comprised in all the other forty-

(1) 30 Ch. D. 454.

nine classes. It is impossible to come to such a conclusion; and, it having been decided that a man can register with respect to those only of the goods in any given class upon which he has used his mark, it follows *à fortiori* that a man whose mark is registered in respect of one particular class cannot, by virtue of that registration, sue in respect of goods which are not within that class at all.

In *Edwards* v. *Dennis* (1) Lord Justice *Cotton* said: "Now what was done in the present case? There was a registration by Mr. *Edwards'* predecessors in title for Class 5, 'unwrought and partly wrought metals used in manufacture.' That was registration in respect of all goods which come under Class 5, a class which includes a vast number of things. . . . The registration in the present case has been for the entirety of that class. In my opinion that is wrong. Even if a trade-mark can be registered which is not in actual use it ought to be restricted to those goods in connection with which it is going to be used. In my opinion it is not the intention of the Act that a man registering a trade-mark for the entire class and yet only using it for one article in that class, can claim for himself the exclusive right to use it for every article in the class. . . . Can a man claim registration for all the articles specified in the class when the business he is engaged in comprises only one specific portion of the articles named in the class? I am of opinion he cannot." I may paraphrase that passage thus: Can a man who is registered in one class claim in respect of articles not comprised in that class, but comprised in some other class? In my opinion he cannot.

There are some important observations in the judgments of the other Lords Justices to the same effect as those which I have read.

Under these circumstances, I come to the conclusion that the registration gives the Plaintiff no right to sue the Defendant for infringement of the trade-mark. The Defendant is charged with selling rolls of paper with the Plaintiff's trade-mark upon them. Rolls of paper come, so far as I can see, under Class 39, and under no other class, and, inasmuch as the Plaintiff has not registered his trade-mark in respect of paper or any other goods

(1) 30 Ch. D. 474.

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comprised in Class 39 which might include paper, he is not entitled to sue the Defendant in respect of his use of the trade-mark for paper, there being no registration in accordance with the statute which entitles him to sue as regards that class.

The issue was then tried, whether the Defendant had been passing off his goods as those of the Plaintiff.

Upon the evidence,

NORTH, J., held that he had, and granted an injunction, with costs, except the costs of the issue as to the trade-mark, which the Plaintiff must pay.

Solicitors: *Linklater, Hackwood, & Co.; Truefitt & Gane.*

W. L. C.

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In re CARLISLE.
CLEGG *v.* CLEGG.

[1889. C. 3953.]

Arbitration—Agreement to refer Matters in Dispute—Staying Legal Proceedings by Party to Agreement—Discretion of Court—Question of Law—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 19.

Under sect. 4 of the *Arbitration Act*, 1889, the Court has a discretion as to staying legal proceedings commenced by one party to a submission to arbitration against the other party.

A deed of partnership between four partners contained a clause providing that, whenever any difference should arise between all or any of the partners, or between any of them and the executors or administrators of any other or others of them, touching the construction of the deed, or anything therein contained, or any account, valuation, &c., or any other thing in anywise relating to the partnership, or the business or affairs thereof, such dispute should be referred to arbitration, pursuant to the provisions of the *Common Law Procedure Act*, or any then subsisting statutory modification thereof. After the death of two of the partners, the executors of one of them commenced, in November, 1889, an action against the two surviving partners and the executors of the other deceased partner, claiming payment from the Defendants, jointly and severally, of a sum which the Plaintiffs alleged to be due to them as executors in respect of their testators' share and interest in the partnership. Before the delivery of any defence two of the Defendants, in December, 1889, took out a summons asking that, pursuant to sect. 11 of the *Common Law Procedure Act*,

1854, all proceedings in the action might be stayed, and the matter in dispute referred to arbitration.

The summons came on for hearing after the commencement of the *Arbitration Act*, 1889.

The Court, being of opinion that the matter in dispute was one of law arising on the construction of the deed, ordered the summons to stand over till after delivery of the defences, in order that application might then be made to the Court to decide any question of law raised by the pleadings before referring it if necessary to an arbitrator to decide any matter of account.

SUMMONS by *Charles Henry Carlisle* and *John Webster Carlisle*, two of the Defendants to the action, asking that, pursuant to sect. 11 of the *Common Law Procedure Act*, 1854, all proceedings in the action might be stayed, the matters therein in difference between the parties having been agreed to be referred to arbitration.

The writ in the action was issued on the 21st of November, 1889. The summons was issued on the 20th of December, 1889.

Henry Carlisle, William Clegg, William Hutchinson Clegg, and *George Kirby* carried on business in partnership together, under the provisions of a deed of partnership, dated the 3rd of February, 1879. The deed contained the following clause :—

"Whenever any doubt, difference, or dispute shall hereafter arise between all or any of the partners, or between any of them and the executors or administrators of any other or others of them, or between their respective executors or administrators, touching the construction of these presents or anything herein contained, or any account, valuation, sale, or division of assets or liabilities, or any other thing in anywise relating to this partnership, or the business or affairs thereof, such doubt, difference, or dispute shall be reduced into writing, and be referred to two arbitrators, or their umpire, pursuant to, and so as, with regard to the mode and consequence of such reference, and in all other respects, to conform to the provisions in that behalf contained in the *Common Law Procedure Act*, or any then subsisting statutory modification thereof."

William Clegg died on the 24th of August, 1887, having by his will appointed the Plaintiffs, *Mary Ann Jane Clegg* and *Edward*

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Carlisle, and *William Hutchinson Clegg* and *George Kirby*, two of the Defendants, executors and trustees thereof.

After the death of *William Clegg*, the business was carried on by *Henry Carlisle* and the Defendants *William Hutchinson Clegg* and *George Kirby* in partnership.

Henry Carlisle died on the 10th of March, 1889, having by his will appointed the Defendants *Charles Henry Carlisle* and *John Webster Carlisle* executors thereof. After the death of *Henry Carlisle*, the Defendants *William Hutchinson Clegg* and *George Kirby* carried on the business in partnership.

By their statement of claim the Plaintiffs, as executors of *William Clegg*, alleged that, under a general account and valuation of the assets and liabilities of the partnership, which were made on the 30th of June, 1887, the amount due to his executors on the 24th of August, 1887, in respect of his share and interest in the partnership, amounted to £30,119, and that of that amount the sum of £28,341 still remained owing to the executors of *William Clegg*.

The Plaintiffs claimed a declaration that the Defendants *William Hutchinson Clegg* and *George Kirby* and the Defendants *Charles Henry Carlisle* and *John Webster Carlisle*, as executors of *Henry Carlisle*, were jointly and severally liable to pay to the Plaintiffs the sum of £28,341, with interest, or to have an account taken of what was due from the Defendants to the Plaintiffs, and an order for payment accordingly, either of the £28,341, with interest, or of what should be found due on taking the account.

No statement of defence had been delivered.

Hornell, for the summons:—

It was held under sect. 11 of the *Common Law Procedure Act*, 1854, that when the parties to an instrument had agreed to refer their differences, either in principle or detail, to arbitration, it was no answer to an application for a stay of proceedings that the difference was one of law as to the construction of the instrument: *Randegger* v. *Holmes* (1). The Act of 1854 is now

(1) Law Rep. 1 C. P. 679.

superseded by the *Arbitration Act*, 1889, s. 4 (1) of which has taken the place of sect. 11 of the former Act.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Plaintiffs:—

The Court has a discretion in the matter: *Lyon* v. *Johnson* (2). The question in dispute is really one of law upon the construction of the partnership deed, and it ought to be decided by the Court.

Napier Higgins, Q.C., and *Benn*, for the other Defendants.

NORTH, J.:—

So far as I can judge at present there is only a question of law to be decided. It would be absurd to refer that question to an arbitrator, who would in all probability invoke the opinion of the Court under sect. 19. I have a discretion under sect. 4, and I think the best course will be to try the question of law

(1) Sect. 4: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court, or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the Applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Sect. 19: "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

Sect. 24: "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act, as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorized or recognized by that Act."

Sect. 25: "This Act shall not affect any arbitration pending at the commencement of this Act, but shall apply to any arbitration commenced after the commencement of this Act under any agreement or order made before the commencement of this Act."

Sect. 29: "This Act shall commence and come into operation on the 1st day of January, 1890."

(2) 40 Ch. D. 579.

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first. I will not dismiss the summons now, but I will order it to stand over until after the defences have been delivered. It will then appear what point of law arises. When the defences have been delivered, any of the parties can apply to me to decide the point of law. If, after that point has been decided, any question of account remains, I can refer it to an arbitrator to settle the figures.

Solicitors: *Merriman, Pike, & Merriman; J. E. Phillips; Snow, Snow, & Fox.*

W. L. C.

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[1889 O. 162.]

1890 Feb. 2, 3.

Statute of Frauds—Sufficient Memorandum—Two independent Documents—Parol Evidence to Connect—Specific Performance.

H. agreed to sell to *O.* a freehold estate for £2375, and signed a memorandum which contained all the essentials of the contract except that it omitted to mention or refer to the property agreed to be sold. Two days afterwards *O.*, pursuant to the contract, sent *H.* a cheque of £375 as a deposit and in part payment of the £2375, and *H.* replied by letter, "I beg to acknowledge receipt of cheque, value £375, on account of the purchase-money for the *F.* estate":—

Held, that parol evidence was admissible to explain the circumstances under which the letter was written, and that, as such evidence connected the letter and the memorandum, the two documents read together constituted a sufficient memorandum within the *Statute of Frauds.*

In August, 1888, *Emma Oliver*, a married woman, possessed of considerable separate estate, negotiated with a Mr. *Hunting* for the purchase of a freehold property known as the *Fletton Manor House* estate. Eventually she agreed to purchase it for £2375, and on the 7th of September, 1888, he signed the following document:—

"Memorandum of terms of agreement between Mr. *Hunting* and Mrs. *Oliver*:

"Price £2375.
"Vendor to make good title.
"Purchaser to pay for her own conveyance.
"Fixtures included in purchase.
"Purchase to be settled as soon as possible.
"Possession on 25th September.
"Deposit to be paid on the 10th."

On the 12th of September, 1888, Mr. *Hunting* wrote and sent a letter to Mrs. *Oliver* in the following words:—"I beg to acknowledge receipt of cheque value £375 on account of the purchase-money for the *Fletton Manor House* estate."

Mr. *Hunting* having refused to complete, Mrs. *Oliver* com-

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menced this action against him, claiming specific performance of the contract of the 7th of September, 1888, and alleging in her statement of claim that in pursuance of the said contract she, on the 10th of September, 1888, paid to Mr. *Hunting* the sum of £375 as a deposit and in part payment of the said purchase-money, and submitting that the memorandum of the 7th and the letter of the 12th of September, 1888, formed a valid contract and a sufficient memorandum within the *Statute of Frauds*.

Mr. *Hunting*, by his statement of defence, did not admit any of the allegations in the statement of claim, and relied on the *Statute of Frauds*. Issue was joined. This was the trial of the action.

Mrs. *Oliver* in her evidence deposed that she sent the cheque of £375, mentioned in the letter of the 12th of September, on account of the purchase-money of the *Fletton Manor House* estate. It was part of the £2375. No other money was payable by her to the Defendant. The £375 was the balance that Mr. *Hunting* was to receive, because the £2000 was to be paid over to a mortgagee of the property. Her solicitor, Mr. *Law*, was going to find the £2000 for her.

Neville, Q.C., and *Dunning*, for the Plaintiff:—

The words of the two documents indicate an agreement to purchase, and parol evidence is admissible to shew what that agreement was. The Plaintiff's evidence proves that the agreement is none other than that embodied in the two documents which, taken together, constitute a sufficient memorandum within the *Statute of Frauds*: *Baumann* v. *James* (1); *Cave* v. *Hastings* (2); *Studds* v. *Watson* (3); *Long* v. *Millar* (4); *Ridgway* v. *Wharton* (5).

Warmington, Q.C., and *Swinfen Eady*, for the Defendant:—

The memorandum must contain all the terms of the agreement, and, if the agreement is contained in more than one document, then there must be a connection between all on the face of them. Parol evidence is admissible to explain an ambiguity,

(1) Law Rep. 3 Ch. 508.
(2) 7 Q. B. D. 125.
(3) 28 Ch. D. 305.
(4) 4 C. P. D. 450.
(5) 6 H. L. C. 238.

but the cases do not go further. You cannot have parol evidence to connect two documents which on the face of them have no reference to or connection with each other: *Warner* v. *Willington* (1); *Boydell* v. *Drummond* (2); *North Staffordshire Railway Company* v. *Peek* (3); *Blagden* v. *Bradbear* (4). Here there is no ambiguity.

Neville, in reply.

KEKEWICH, J.:—

The elementary proposition about which there is no doubt is this—the memorandum to be signed by the party sought to be charged, so as to bring a particular case within the *Statute of Frauds*, need not be on one piece of paper, nor need it be a complete document, signed by the party at one and the same time. It may be contained in two or more pieces of paper, but they must be so connected that you can read them together, so as to form one memorandum of the contract between the parties. Directly you get beyond that, you get into difficulty. One can illustrate that in a simple manner. An intending purchaser accepts an offer made by a proposing vendor thus: "In reply to your letter of the 14th instant." Can one annex to that reply the letter of the 14th instant? Surely one cannot, without inquiring what letter it is; unless the purchaser has, with unusual prudence, completed the reference by saying, "In reply to your letter of the 14th instant, a copy of which is on the other side." In the absence of any such complete evidence as that, one must inquire what the letter of the 14th instant was, because *non constat*, it may have been a reference to any one of half a dozen different letters; and so, from that very simple illustration, one can go through a large variety of more complex ones. It is not for me to say that the old rule was better or worse than the present rule; but that it was a different rule, notwithstanding the criticisms in the cases which Mr. *Neville* has given me, I have no doubt. I take the old rule from the original edition of Lord

(1) 3 Drew. 523.
(2) 11 East, 142.
(3) E. B. & E. 1001.
(4) 12 Ves. 466.

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Blackburn, On the Contract of Sale, which is cited—I have not the original work before me—by *Williams*, J., in *North Staffordshire Railway Company* v. *Peek* (1), where, after referring to *Hinde* v. *Whitehouse* (2), and *Kenworthy* v. *Schofield* (3), he says: "The principle of these cases seems to me to be well stated in the same work by my Brother *Blackburn*, as follows: 'If the contents of the signed paper themselves make reference to the others so as to shew by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing'" (as in the case which I have mentioned of a letter referring to a previous letter, of which the copy is annexed); "'but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shewn by circumstances not apparent on the face of the writings, the memorandum is not all in writing, for it consists partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing.'" The old case of *Boydell* v. *Drummond* (4), and some other cases, might be consistent with that rule; but certainly of late a different rule has been introduced, and it is a rule, to say the least, consistent with the convenience of mankind, because if you were to exclude parol evidence to explain such a doubtful reference as "the letter of the 14th instant," or it might be simply "your letter," the result might in a large number of cases be gross injustice. Now I take it to be quite settled that in a case of that kind you may give parol evidence to shew what the document referred to was. I take it that you may go further than that, and that if you find a reference to something, which may be a conversation, or may be a written document, you may give evidence to shew whether it was a conversation or a written document; and, having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved. So far there is no difficulty. That was applied in the case of *Ridgway* v. *Wharton* (5), where the question was on the

(1) E. B. & E. 1001.
(2) 7 East, 558.
(3) 2 B. & C. 945.
(4) 11 East, 142.
(5) 6 H. L. C. 238.

meaning of instructions which did not by any means necessarily point to a written document; but later the cases have gone further than that, and it seems to me that *Long* v. *Millar* (1), followed by *Field*, J., in *Cave* v. *Hastings* (2), does establish a very much larger series of exceptions. In *Long* v. *Millar* I profess myself rather embarrassed by the judgment of *Thesiger*, L.J.—that is to say, I am unable quite to understand what he means by the passages on p. 456, which seem to me rather inconsistent; but seeing that I have the judgments of *Bramwell* and *Baggallay*, L.JJ., without the slightest doubt or embarrassment, and that *Thesiger*, L.J., concurred in their judgment, I think I may put any difficulty of that kind aside. *Bramwell*, L.J., gave a judgment which, beyond its reference to the particular case, is exceedingly useful as illustrating this branch of law; because he gives an illustration which seems to me to go to the root of the matter. The illustration he gives is this (3): "Suppose that *A.* writes to *B.*, saying that he will give £1000 for *B.'s* estate, and at the same time states the terms in detail, and suppose that *B.* simply writes back in return, 'I accept your offer.' In that case there may be an indentification of the documents by parol evidence, and it may be shewn that the offer alluded to by *B.* is that made by *A.*, without infringing the *Statute of Frauds*, sect. 4, which requires a note or memorandum in writing." If that is sound, which I take it to be, according to other cases, and according to the convictions of Judges in older cases which are introduced into the old law, it is difficult, perhaps, to say where parol evidence is to stop; but substantially it never stops short of this, that wherever parol evidence is required to connect two written documents together, then that parol evidence is admissible. You are entitled to rely upon a written document, which requires explanation. Perhaps the real principle upon which that is based is, that you are always entitled in regarding the construction and meaning of a written document to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances with reference to

(1) 4 C. P. D. 450. (2) 7 Q. B. D. 125.
(3) 4 C. P. D. 454.

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what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted. Turning to the case before me, I find a letter of the 12th of September, 1888, written by the Defendant to Mrs. *Oliver*; and in that he says: "I beg to acknowledge receipt of cheque, value £375, on account of the purchase-money for the *Fletton Manor House* estate, for which I thank you." I have two things here perfectly clear, that there is a property called *Fletton Manor House* estate, which constitutes the subject of a purchase, and, therefore, the subject of a sale. I have also that £375 is part of the purchase-money for that house; but, beyond that, I have no terms of a contract. I am entitled to consider the circumstances under which the letter was written, in order to give any meaning that I properly can to it—not to add terms to it, but to find out what the meaning necessarily must be, having regard to the facts and circumstances—and, having got the evidence which I have in this case, the conclusion is inevitable that it refers to a previous memorandum of terms of agreement under which Mrs. *Oliver* becomes the purchaser of this particular property for the price of £2375, on account of which the cheque for £375 was sent. Having got that evidence in, having got the connection between the two documents, I have then enough to enable me to read the two documents together, and, reading them together, I have a distinct memorandum of contract, specifying all the terms, the second one supplying what the first one omitted to give, namely, singularly enough, the property which was intended to be purchased and sold. That being so, the objection that there is no memorandum within the *Statute of Frauds* fails.

I have not referred to the late case of *Studds* v. *Watson* (1), before Mr. Justice *North*, because I am not quite sure how far that learned Judge intended to go. If I am right in my view of his judgment, that he only allowed the parol agreement to be proved to see whether it connected the two written documents, and then, having got it in evidence, found that it did, and so was able to connect the two documents—if that is the right view, which I believe it to be, of what he intended—then it really follows *Long*

(1) 28 Ch. D. 305.

v. *Millar* (1) and *Cave* v. *Hastings* (2), to both of which he referred in his judgment.

Under these circumstances, I think the Plaintiff is entitled to judgment for specific performance, and, of course, to the costs of the action.

Solicitors for Plaintiff: *Law & Worssam*, agents for *W. F. Law, Stamford.*

Solicitors for Defendant: *Hatchett-Jones & Co.*, agents for *Ackers, Peterborough.*

H. L. F.

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Feb 24, 28.

[1888 D. 1995.]

Infant—Marriage Settlement—Voidable—37 & 38 Vict. c. 62 [Revised Ed. Statutes, vol. xvii. p. 255.]

A settlement of property made by an infant on her marriage is, as regards the infant, voidable and not void; and is not within either section of the *Infants Relief Act*, 1874.

Sect. 1 of that Act applies only to the three classes of contracts therein specified.

Coxhead v. *Mullis* (3) and *Ex parte Jones* (4) observed upon.

By a marriage contract in Scotch form, executed on the 19th and 21st days of January, 1878, *George Dixon*, the intended husband, directed the trustees therein named to hold certain shares and mortgage-money on trust for his intended wife, the Plaintiff *Alice Margaret Alexandrina Duncan* (then *Alice Margaret Alexandrina Shirer*), during her life with trusts over for the benefit of *George Dixon* and the issue of the marriage. And the Plaintiff, who was then eighteen years of age, assigned certain shares and property to which she was entitled to the trustees on similar trusts.

The Plaintiff had then an English domicil, and the marriage was solemnized at *Cheltenham*, on the 24th of April, 1878.

After the marriage she and her husband resided at *Glasgow*

(1) 4 C. P. D. 450.
(2) 7 Q. B. D. 125.
(3) 3 C. P. D. 439.
(4) 18 Ch. D. 109, 122.

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until a short time before the 2nd of August, 1883, when a decree dissolving the marriage was pronounced by a Scotch Court of competent jurisdiction at the action of the husband. There was one child of the marriage.

The trustees asserted that, according to the law of *Scotland*, she had forfeited all her rights under the marriage contract, and refused to pay the income of the settled funds to her. She brought this action against her former husband and the trustees, alleging that she had never understood the purport and effect of the contract made on her marriage; and that she had discovered that she, being under the age of twenty-one years at the time when she executed the contract the contract was void or voidable at her instance; and that she gave to the trustees notice. Accordingly on the 6th of September, 1884, she claimed a declaration that the contract was void or voidable and that she was entitled to hold her property comprised in it freed and discharged from the contract.

The parties desired the opinion of the Court on several questions of law: 8. Whether the marriage contract was, as against the Plaintiff, void *ab initio*. 9. Whether the said contract was as regards the Plaintiff voidable (as distinguished from void) *ab initio*, at her instance. These were the only questions argued on this occasion, the other questions depending chiefly on Scotch law.

Warmington, Q.C., and *Ribton*, for the Plaintiff:—

An infant cannot make a binding contract, and such a contract is incapable of ratification: *Seaton* v. *Seaton* (1); *Smith* v. *Lucas* (2). The contract is void also under 37 & 38 Vict. c. 62. That Act is badly drawn, but includes all contracts and is not confined to those for necessaries. In *Ex parte Jones* (3) the goods were not for the consumption of the infant: *Coxhead* v. *Mullis* (4) and *Ditcham* v. *Worrall* (5) are cases on the Act. The object of the Act was to put an end to disputes whether contracts were void or voidable: *Pollock* on Contracts (6). Before the Act they

(1) 13 App. Cas. 61.
(2) 18 Ch. D. 531.
(3) Ibid. 109.
(4) 3 C. P. D. 439.
(5) 5 C. P. D. 410.
(6) Page 34, Ed. 1876.

were void if not for the infant's benefit, voidable if for his benefit. The Act was to make them all void: *Kingsman* v. *Kingsman* (1) and *Ex parte Kibble* (2) are also on the Act.

S. Hall, Q.C., and *E. Ford*, for the Defendants:—

The settlement includes property which belonged to the husband, and he has had the benefit of it. Apart from the *Infants Property Act*, the settlement might have been voidable, but was not void. In *Pollock* on Contracts (3) the subject is further considered. This marriage contract is valid unless it has been rescinded: *Oakes* v. *Turquand* (4). So far from rescinding the contract the Plaintiff has brought an action in the Scotch Courts upon it. The Act was intended to protect thoughtless infants who had fallen into the hands of designing persons, and was not intended to apply to a case like this. If all contracts by an infant are void, what is the use of sect. 2? A reasonable construction must be put on the Act: *Valentini* v. *Canali* (5).

Warmington, in reply.

Feb. 28. KEKEWICH, J.:—

On the argument of the point of law which has now to be decided, the *Infants Relief Act*, 1874, was freely criticised. Further consideration has convinced me, not only that the questions then discussed were real and serious, but that there are many others of at least equal difficulty. It is not, however, convenient to discuss the provisions of the Act further than is necessary for the decision before me, and I must not be understood to intimate an opinion on any questions not decided. Nor is it necessary to discuss at length the law respecting infants' contracts independently of the Act. Suffice it to say that such contracts are, with some exceptions or qualifications, which there is no need here to specify, voidable—which term I understand to mean that they are valid until repudiated. It was suggested in argument that "voidable" may equally well signify "invalid until confirmed";

(1) 6 Q. B. D. 122.
(2) Law Rep. 10 Ch. 373.
(3) Page 58, Ed. 1885.
(4) Law Rep. 2 H. L. 325.
(5) 24 Q. B. D. 166.

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but to my mind that, apart from the ordinary use of language, does not express the technical sense of the word. As regards those contracts which operate as covenants and affect property, I apprehend that you must look back to the date of the contract for the purpose of ascertaining its operation, and, unless there has been a subsequent repudiation within the limits of time and in the manner allowed by law, treat it as binding the property according to the expressed intention of the instrument. For that I have the high authority of Sir *George Jessel*, who, in *Smith* v. *Lucas* (1), says: "If, therefore, this is a covenant to settle the future acquired property of the wife, and nothing more is done by her, the covenant will bind the property. There is no reason, so far as I am aware, for distinguishing a voidable covenant from any other covenant: till it is avoided it is a binding covenant." There are, no doubt, to be found expressions of other Judges apparently in conflict with this, as, for instance, the language of Lord *Cairns* in *Codrington* v. *Codrington* (2); but it must be borne in mind that in cases of that class (to which this also belongs) the *quondam* infant is claiming to repudiate the settlement, and other parties are endeavouring to set up, adversely to that claim, conduct or acts equivalent to ratification. The language of judgments in such cases is directed to those contentions, and must not readily be construed as expressing a difference from Sir *George Jessel's* statement of the law.

This so far brings the case in hand within sect. 1 of the *Infants Relief Act*, 1874, that it takes it out of the proviso. In other words, the contract, being voidable, is not by the proviso excepted from the operation of the earlier part of the section. Before considering the earlier part, let me put aside the decisions which have been quoted on sect. 2—decisions mainly directed to the question whether a promise of marriage is a contract within it, and, if so, what is the proper application to such a promise of the provision respecting ratification. I do not say that it was useless to refer to those authorities. I think that the case could not have been thoroughly argued without a reference to them, and at one time I thought that they would throw more light on the question for my decision than they now appear to do. In

(1) 18 Ch. D. 543. (2) Law Rep. 7 H. L. 854.

the result I pass them by with less hesitation, because I find it difficult to connect the first and second sections of the Act together so as to make a coherent whole, and I do not understand how, if the second section receives the wide construction which was given to it by the Lord Chief Justice in *Coxhead* v. *Mullis* (1), there is much, if anything, left for the operation of the first section. This puzzle, if it be one, I must leave for solution elsewhere or on another occasion. The contract in this case is what is sometimes termed a marriage contract, but the more familiar description to us is that of a marriage settlement. Is a contract of that character within the purview of the Act? For the present purpose one need not closely distinguish between settlements purporting to operate by way of grant and settlements operating only by way of covenant. The particular settlement is of the latter kind, and is therefore essentially a contract. It was said that this, and indeed every other contract into which an infant can possibly enter, must be within the statute, because it is an Act to amend the law as to contracts of infants, and therefore all contracts of infants must be affected by it. The argument having been advanced, I have thus noticed it; but a branch of law is no less amended because some subdivisions of it are untouched by the amendments. Take at a venture the *Trustee Act*, 1888, which is stated to be an Act to amend the law relating to the duties, powers, and liabilities of trustees. One would not expect to find every duty, every power, and every liability brought within the purview of the Act, nor is it in fact thus extensive.

A more plausible argument was raised on the words "all contracts" with which the first section commences. The next seven words are doubtless parenthetical, but omitting them, and omitting also the exception of contracts for necessaries, it was urged that the particular contracts mentioned were mentioned only as examples, and without any intention to cut down the universality of "all contracts." This argument claimed and derived support from the proviso, of which, according to the ordinary rules of construction, the effect must be to except out of the earlier part of the section something which, but for the proviso, would be within it. Therefore, it is said, the section is intended to cover

(1) 3 C. P. D. 439.

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every contract by law voidable, and the contract in question being of that character the section covers that. The answer to this argument is found in the true construction of the proviso. The meaning of the proviso that the enactment shall not invalidate any contract, &c., is that no contract which the enabling part would by force of language render void, shall be so rendered if it falls within a specified class. It may be, and I think is, difficult to determine precisely what is comprehended in that class, and the difficulty is increased by the sweeping exception with which the section concludes. Still, I think it would not be right to construe the proviso as enlarging the class of contracts falling within the enactment, when it can be fairly and properly construed without attributing to it that effect.

The enactment, standing alone, is, in my judgment—but subject to a remark to be presently made—free from difficulty. The contracts specified are of three classes—(1) contracts for the repayment of money lent; (2) contracts for goods supplied; and (3) accounts stated. To all contracts of these classes the enactment is expressly applied, and contracts of other classes remain unaffected. That seems to me to be the plain meaning of the language, and I can discern no reason for placing a forced construction on it. It is said that I am not at liberty to follow the bent of my own opinion on this point, and that it has been otherwise decided by Judges to whose authority I must bow. I must indeed bow to them, and should not hesitate to do so if I thought they had really decided, or even expressed a definite judicial opinion on that point, but I do not. In *Ex parte Jones* (1) Sir *George Jessel* used language which, apart from the contract, certainly favours the argument which I am rejecting. He says that the words of the Act apply to all contracts of an infant except those which are expressly excepted, and that the words "are of universal application." But he was considering the question whether the words cover trade contracts for the supply of goods as well as those into which a non-trader or a trader, apart from trading, may daily enter; and there was no occasion for him to consider—nor do I think that he did consider—whether contracts wholly dissimilar to those specified in the section were intended

(1) 18 Ch. D. 122.

to be governed by it. There really is no other authority which can fairly be cited as deciding or expressing a definite opinion on the point. I have already eliminated the cases on the second section, which include *Ex parte Kibble* (1), but I revert to *Coxhead* v. *Mullis* (2), to say, first, that although Lord *Coleridge* (3) notices the argument in favour of the restricted meaning of sect. 1, he does not either uphold or reject it; and, secondly, that, while applying it differently—because to different language—I venture respectfully to agree with him "that it is better to suppose that Parliament meant what Parliament has clearly said, and not to limit plain words in an Act of Parliament by consideration of policy, if it be policy, as to which minds may differ and as to which decisions may vary." I think that the two questions of law submitted to me by consent when the case was last before the Court ought to be answered by declaring that the marriage contract set out in the statement of claim was, as regards the Plaintiff, voidable as distinguished from void.

Solicitors for Plaintiff: *Bennett & Leaver.*
Solicitors for Defendants: *McKenna & Co.*

(1) Law Rep. 10 Ch. 373. (2) 3 C. P. D. 439.
(3) 3 C. P. D. 442.

C. M.

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Dec. 19.
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[1889 B. 5296.]

Vendor and Purchaser—Contract—Conveyance— Title—Trustees having no immediate Power of Sale—Concurrence of Tenant for Life under Settled Land Acts.

Vendors contracted to sell land as trustees for sale and the purchaser paid a deposit. Upon investigation of the title it appeared that the vendors had no power of sale until the death of an existing tenant for life. The purchaser objected to the title, and the vendors thereupon offered to procure a conveyance from the tenant for life under the powers of the *Settled Land Acts.* The purchaser declined to enter into a new contract with the tenant for life, and took out a summons under the *Vendor and Purchaser Act*, 1874, for the return of the deposit :—

Held (affirming the decision of *Kay*, J.), that the vendors were not entitled to compel the purchaser to enter into a new contract with the tenant for life, and that they must repay to him the deposit with interest at 4 per cent., and his costs of investigating the title.

ADJOURNED SUMMONS under the *Vendor and Purchaser Act*, 1874.

By a contract dated the 22nd of October, 1889, *W. G. T. Bryant* and *F. J. Cullingford* agreed to sell a freehold house and land to *W. Barningham* for £11,250. The contract was to be completed on the 2nd of December, 1889; and there was a clause providing that, on payment of the remainder of the purchase-money, the vendors and other necessary parties (if any) should convey the property to the purchaser; and that the conveyance and every assurance, act, matter, and thing (if any) which should be required by the purchaser for tracing, getting in or releasing any outstanding estate, right or interest, or for completing or perfecting the vendors' title, or for any other purpose, should be prepared, made and done by and at the expense of the purchaser; and that the vendors, being trustees for sale, should not be required to enter into any covenant except the ordinary implied statutory covenant that they had not incumbered. A deposit of £1125 was paid by the purchaser.

Upon the investigation of the title it appeared that the vendors were the trustees under a will whereby the house and

land comprised in the contract were devised upon trust to permit the testator's widow to reside therein during her life, and after her decease upon trust for sale.

The purchaser accordingly required that evidence of the death of the testator's widow should be given, and in answer to such requisition was informed that she was still living, and would make a title as tenant for life under the *Settled Land Acts*, and that an application to the Court to appoint trustees for the purposes of the Acts was in fact pending.

In reply, on the 25th of November, 1889, the purchaser, by his solicitor, wrote to the vendors declining to enter into any fresh arrangement or to purchase the property from the tenant for life, and requiring the vendors to return the deposit with interest, and to pay his costs of investigating the title. The vendors, on the 29th of November, replied by letter insisting that, as they were prepared to procure the concurrence of all necessary parties, the purchaser must complete his contract, and stating that trustees had been duly appointed for the purpose of the *Settled Land Acts*, and had in writing waived the statutory notice of, and consented to, the sale.

The purchaser then took out the present summons asking that it might be declared that a good title to the hereditaments comprised in the contract had not been shewn in accordance therewith, and that the vendors might be ordered to repay to him the deposit with interest at 4 per cent. from the time of payment, and his costs of investigating the title.

The summons was heard before Mr. Justice *Kay*, on the 19th of December, 1889.

Marten, Q.C., and *J. G. Wood*, for the purchaser, in support of the summons:—

The vendors are not trustees for sale, and therefore cannot make a title in accordance with the contract. At the time when they proposed that the tenant for life should make a title under the *Settled Land Acts* she could not have entered into a contract, as no trustee had been appointed for the purposes of the Acts.

[KAY, J., referred to *Hatten* v. *Russell* (1).]

(1) 38 Ch. D. 334.

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But the vendors cannot force the purchaser to enter into a new contract with the tenant for life; and, moreover, there has been no binding offer by the tenant for life to enter into such contract.

They were stopped by the Court.

Renshaw, Q.C., and *Frederic Thompson*, for the vendors:—

As in this case the vendors could make, and offered to make, a good title previously to the time fixed for completion, there has been a sufficient compliance with the contract. This is not a case in which the time for completion is of the essence of the contract.

[KAY, J.:—The vendors had no power to sell whatever; they cannot say to the purchaser, "We will substitute a contract by somebody else."]

The tenant for life can adopt the contract. The question is merely one of conveyance, not of contract. The purchaser, by coming to the Court under the *Vendor and Purchaser Act*, affirms the contract. His objection is that the vendors have not made a good title in accordance with the contract. He cannot, under the Act, come to the Court in reference to the validity of the contract. It has always been held that where a vendor having only a partial interest has contracted to sell the fee simple, it is sufficient, if before the time fixed for completion, he is in a position to convey the fee: *Salisbury* v. *Hatcher* (1); *Chamberlain* v. *Lee* (2); *Murrell* v. *Goodyear* (3). A distinction has been drawn between such a case and that in which the person contracting to sell has no interest whatever. But in the present case the vendors have the legal estate, and are not strangers to the property. It is clear that the vendors, as trustees, could have made a good title if they could have procured the concurrence of all the beneficiaries. By virtue of the *Settled Land Act*, 1882, they are substantially in that position; as the concurrence of the tenant for life under the powers of the Act is equivalent to the concurrence of all the beneficiaries. [They referred also to *Duke of Marlborough* v. *Sartoris* (4)].

(1) 2 Y. & C. Ch. 54.
(2) 10 Sim. 444.
(3) 1 D. F. & J. 432.
(4) 32 Ch. D. 616.

KAY, J. (without calling for a reply):—

I am clearly of opinion that this contract cannot be enforced. The facts are shortly these. Trustees who had no present power of sale whatever, but who would have such a power at a future time, and upon a future event, entered into this contract. The purchaser, when he came to look into the title, raised the objection that the trustees had no power of sale. Thereupon the trustees admitted that the objection was valid, and that they had no power of contracting for the sale of the property, but they said that there was a tenant for life, and that under the *Settled Land Acts* the tenant for life would make a new contract with the purchaser, and sell the property to him in substitution for the trustees.

What right has a vendor to say to his purchaser, "Somebody else will make a new contract with you, and I will compel you to accept a conveyance from him under that new contract?" How do I know what difficulty might not arise under a contract with the tenant for life under the *Settled Land Act?* What possible power have I to say to a purchaser, "You shall substitute for this contract which cannot be carried out, a contract with the tenant for life which can be carried out under the *Settled Land Act*"? I have no power whatever to do anything of the kind. I might put many analogous cases. It is sought to make out the present case in this way. It is said that if a vendor, who at the time when he sells has only a partial interest in an estate, affects to sell the fee simple, the Court will enforce that contract, provided that before the time fixed for completion, he can get in the whole fee simple. That is quite right; for then he acquires the power of carrying out his contract literally; he then can convey the fee simple. Of course, the Court would not put the parties through the idle form of conveying to the vendor, and the vendor conveying to the purchaser, when the very same thing might be accomplished by getting the person entitled to the outstanding estate or interest to convey direct to the purchaser. I agree that there are cases of that kind. But who ever heard that a man who could not contract at all, and who could not obtain a conveyance of the estate to himself before the time fixed for completion, could compel the purchaser to enter into a

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new contract with somebody else? During the argument I illustrated the matter in this way. Suppose under a settlement there was vested in the trustees of the settlement a power of sale during the life of *A. B.*, a living person, and that under a will there was power in the trustees of the will to sell after the death of *A. B.*, the whole fee simple being in the other trustees, and that the trustees of the will, who had no present power of sale, contracted for the sale of the whole estate, and the purchaser raised the objection that they had no power to sell anything but the reversion, could they say to him, "We will compel you to accept a sale from the trustees of the settlement." The contention that they could do so seems to me to be unsustainable.

These trustees have no power to make the purchaser accept one contract in substitution for another; they have no power to make him enter into a contract with anybody but themselves, and their own contract they are utterly unable to carry out. Accordingly, I think that the purchaser is quite right in his objection, and this summons must be allowed with costs.

Marten, Q.C., asked that the order might extend to return of the deposit with interest at 4 per cent. from the day of payment.

Reference was then made to *In re Higgins and Hitchman's Contract* (1); *In re Yeilding and Westbrook* (2); *In re Hargreaves and Thompson's Contract* (3); *In re Ebsworth and Tidy's Contract* (4); and also to *In re Young and Harston's Contract* (5); *In re Davis and Cavey* (6).

KAY, J., said that in each of the first four cases mentioned the contract was rescinded, and the vendor directed to repay the deposit with interest at 4 per cent., and to pay the purchaser's costs of investigating the title, and the costs under the *Vendor and Purchaser Act*, and there would be a similar order in the present case.

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From this decision the vendors appealed. The appeal was heard on the 11th of March, 1890.

(1) 21 Ch. D. 95.
(2) 31 Ch. D. 344.
(3) 32 Ch. D. 454.
(4) 42 Ch. D. 23.
(5) 31 Ch. D. 168.
(6) 40 Ch. D. 601.

Renshaw, Q.C., and *Frederic Thompson*, for the Appellants:—

It is well settled that although vendors have not a good title at the date of the contract, they can obtain specific performance if they can make a title at the time fixed for completion, or even before the date of the Chief Clerk's certificate: *Langford* v. *Pitt* (1); *Hibblewhite* v. *M'Morine* (2); *Mortimer* v. *M'Callan* (3). In the present case the purchaser repudiated the contract on the 25th of November. Before the 2nd of December, the day fixed for completion, the tenant for life might have died, and then the vendors' power of sale would have arisen. And, in fact, at that date the vendors had obtained the concurrence of the tenant for life. The conditions of sale shew that it was contemplated that other persons besides the vendors would have to concur. The vendors were therefore, on the 2nd of December, and are still, able and ready to perform their contract: *Sidebotham* v. *Barrington* (4); *Duke of Marlborough* v. *Sartoris* (5); *Hatten* v. *Russell* (6); *Wynn* v. *Morgan* (7); *Murrell* v. *Goodyear* (8); *Nock* v. *Newman*, cited in *Dart's* Vendors and Purchasers (9); *Paton* v. *Rogers* (10).

Marten, Q.C., and *J. G. Wood*, for the purchaser, were not called on.

COTTON, L.J.:—

In my opinion, this appeal fails. I do not doubt that, if a vendor is able to make a good title before the day fixed for completion of the contract, the contract can be enforced. But that is not the case here. The vendors cannot, even now, shew a good title in themselves. They cannot convey, because their power does not arise till after the death of the tenant for life, who is still living. But they say, "Although we cannot convey, the tenant for life can sell under the powers of the *Settled Land Act*." If the tenant for life were a person who could concur, so as to make the title of the vendors a good title, the case would be

(1) 2 P. Wms. 629.
(2) 5 M. & W. 462.
(3) 6 M. & W. 58.
(4) 4 Beav. 110.
(5) 32 Ch. D. 616.
(6) 38 Ch. D. 334.
(7) 7 Ves. 202.
(8) 1 D. F. & J. 432.
(9) 6th Ed. vol. ii. p. 1179.
(10) 1 V. & B. 351.

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different. But the title of the vendors in this case is not made good by joining with them the persons entitled to sell under the *Settled Land Act*. The purchaser has contracted with the vendors that they should make a good title as trustees under the will, and he has never agreed to purchase from the tenant for life. The appeal must be dismissed.

LINDLEY, L.J., concurred.

LOPES, L.J.:—

I am of the same opinion. The contract with the purchaser was that a good title should be made by the trustees as vendors, and what they now propose is to substitute the tenant for life as vendor. This cannot be done.

Solicitor for Purchaser: *Alfred Henry Holmes.*
Solicitors for Vendors: *Simpson & Cullingford.*

M. W.

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[1888 G. 220.]

Patent Action—Invalidity of Patent—Particulars of Objections—Successful Defendant—Costs—Certificate—Taxation—Set-off—"Improper, vexatious or unnecessary" proceedings—Condition Precedent—Patents, Designs and Trade Marks Act, 1883, *s.* 29, *sub-s.* 6—*Rules of Supreme Court,* 1883, *Ord.* LXV., *r.* 27, *sub-rr.* 20, 21.

Where a patent action, in which the Defendant has pleaded no infringement and also invalidity of the Plaintiff's patent, is dismissed with costs on the ground of no infringement alone—the Court not deciding the question of invalidity at all—and no certificate is given, under sect. 29, sub-sect. 6, of the *Patents, Designs and Trade Marks Act,* 1883, that the Defendant's particulars of objections to the validity of the patent were "reasonable and proper," so that on taxation his costs of the particulars are disallowed on the ground of the absence of such a certificate; the Plaintiff is not entitled, under Rules of Supreme Court, 1883, Order LXV., r. 27, sub-rr. 20, 21, to set off, as against the costs payable by him, costs incurred by him in consequence of the Defendant's particulars, whether the Defendant may, at the trial, have called evidence in support of them or not.

It is a condition precedent to a party being allowed under sub-rule 20

the costs occasioned to him by improper proceedings of the other party that there must have been a disallowance of the costs of the other party, either by the Court or by the Taxing Master under sub-rule 20, on the ground that the proceedings were "improper, vexatious, or unnecessary"; and disallowance of the Defendant's costs of particulars on the mere ground of the absence of the statutory certificate is insufficient to entitle the Plaintiff to the costs occasioned to him by them, and the Taxing Master cannot enter into the question whether the particulars were improper, as the Defendant's costs relating to them, being disallowed for want of a certificate, are not before him for taxation.

THE action was for the infringement of the Plaintiff's patent for improvements in presses for pressing tiles. The Defendants pleaded no infringement, and also invalidity of the patent. Upon the plea of invalidity the Defendants delivered ten particulars of objections.

At the trial the Defendants called witnesses in support of some only of their objections; the Plaintiff called witnesses to rebut that evidence, and also had witnesses in readiness to meet those objections upon which the Defendants did not adduce any evidence at all.

On the 22nd of May, 1889, his Lordship delivered judgment, finding that there had been no infringement, and he accordingly dismissed the action with costs, such costs to be taxed and paid by the Plaintiff to the Defendants.

The case was decided solely on the ground of no infringement, his Lordship declining to consider the question of validity at all. The Defendants did not apply for, nor did his Lordship grant any certificate, under sect. 29, sub-sect. 6 of the *Patents, Designs and Trade Marks Act*, 1883, that the particulars of objections or any of them were "reasonable and proper."

The Plaintiff appealed from the judgment, and on the 29th of October, 1889, it was affirmed by the Court of Appeal.

On the taxation of the Defendants' costs under his Lordship's judgment, the Taxing Master disallowed all the costs of the particulars of objection on the ground of the absence of the statutory certificate. The Plaintiff then carried in, by the leave of the Taxing Master, a bill of costs said to have been occasioned to him by the Defendants' particulars, and applied that such costs might be taxed and set off, under Rules of the Supreme

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Court, 1883, Order LXV., r. 27, sub-rr. 20, 21, against the costs payable by him to the Defendants; but the Taxing Master refused to tax the bill, and disallowed the same *in toto*. The Plaintiff then carried in objections to the Master's refusal to tax, but they were disallowed. The Taxing Master's answers to the objections were as follows:—

"The taxation of the Plaintiff's bill is sought in pursuance of the 65th Order, r. 27, sub-r. 20.

"It is admitted by the Plaintiff that the said bill consists wholly of costs occasioned to him in consequence of the defendants' objections, who, on the trial, did not obtain the statutory certificate of allowance, and who thereby lost, on the taxation of their bill, the whole of their costs of and relating to the said objections.

"On the above admission I have disallowed the whole of the Plaintiff's bill, as I am unable to see that any part of the disallowed items in the Defendants' bill were, within the meaning of Order LXV., r. 27, sub-r. 20, improper, vexatious, or unnecessary, or contained vexatious or unnecessary matter, or were of unnecessary length, or were caused by misconduct or negligence; the whole of such disallowed items in the Defendants' bill being disallowed for the sole reason that the Defendants did not obtain the said statutory certificate allowing their objections."

The Plaintiff then took out a summons to have his objections to the Taxing Master's refusal to tax allowed, and for a reference back to the Master to vary his certificate of taxation accordingly, or that the costs occasioned to the Plaintiff through the Defendants having disputed the validity of the patent might be taxed and set off against the Defendants' taxed costs.

The summons came on for hearing before Mr. Justice *Kay* on the 7th of February, 1890.

Marten, Q.C., and *Swinfen Eady*, for the Plaintiff:—

We submit that, under Rules of the Supreme Court, 1883, Order LXV., r. 27, sub-r. 20, in the absence of any direction by the Court at the trial as to the disallowance of the costs of any pleading or evidence which is "improper, vexatious or unneces-

sary," it is the duty of the Taxing Master to look into the matter himself: *In re Wormsley* (1).

[KAY, J.:—We must first of all consider how far the case is affected by sect. 29, sub-sect. 6 of the *Patents, Designs and Trade Marks Act*, 1883, which says that a plaintiff or defendant shall not be allowed the costs of his particulars of objections unless such particulars are certified to have been "reasonable and proper."]

Although the obtaining a certificate may be a condition precedent for the allowance of costs of particulars of objections, that does not preclude the Taxing Master from looking into the matter, under Order LXV., r. 27, sub-r. 20, to see whether the delivery of particulars by the one party has caused expense to the other. The mere fact of a certificate not having been obtained does not supersede the duty of the Taxing Master under that rule to look into the matter to see whether costs have been improperly occasioned by the particulars. Although the Defendants' costs of their particulars were disallowed by the Taxing Master because there was no certificate, yet, independently of that, they might have been found, on investigation, to have been "improper, vexatious, or unnecessary;" and we say they were at least unnecessary, as the result shewed, and the Plaintiff ought to be allowed, under Order LXV., r. 27, sub-r. 21, to set off the costs thereby occasioned to him against the costs he has to pay the Defendants: *Badische Anilin und Soda Fabrik* v. *Levinstein* (2). We should, at all events, be allowed such costs as were occasioned by those particulars in support of which no evidence was called by the Defendants.

[KAY, J.:—There may possibly be something in that point; but where evidence has in fact been given by the Defendants in support of some of the particulars, and the Court makes no finding upon such evidence, how can the Taxing Master say that those particulars are improper, vexatious, or unnecessary?]

The Court has in effect decided that the objections were at least unnecessary, because it held that the Defendants were entitled to succeed on the issue of no infringement alone, and

(1) 27 W. R. 36. (2) 29 Ch. D. 366, 418.

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therefore need not have delivered any objections on the other issue: *Longbottom* v. *Shaw* (1).

[KAY, J.:—I wish to hear the Defendants only as to the costs occasioned to the Plaintiff by those particulars upon which the Defendants gave no evidence.]

Aston, Q.C., and *Chadwyck Healey*, for the Defendants:—

If costs could not be allowed to the Defendants in respect of evidence not given, the costs of meeting or preparing to meet such evidence should not be allowed to the Plaintiff. If, according to *Longbottom* v. *Shaw*, it was improper and unnecessary for the Defendants to have delivered these objections at all, it was equally improper and unnecessary on the part of the Plaintiff to bring evidence to meet them. Sect. 29, sub-sect. 6, of the *Patents, Designs and Trade Marks Act*, 1883, overrides the general directions given in Order LXV., rule 27, sub-r. 20; and therefore, as no certificate was given, the Plaintiff cannot have costs occasioned by the Defendants' particulars, the costs of which have been disallowed. In *Boyd* v. *Horrocks* (2), the Court of Appeal declined to go into objections merely for the purpose of deciding who should pay the costs of them; and if the Court at the trial cannot decide the question of the costs of objections without going into the evidence, surely the Taxing Master, upon the evidence submitted to him on taxation, cannot do that which the Court itself was unable to do. All that Order LXV., rule 27, sub-r. 20, says is, that, if the Court has not directed the disallowance of costs, the Taxing Master may supply the omission; but he cannot do that which the Court has said ought not to be done, that is, look into the evidence to see whether the objections are reasonable and proper. What is now asked is outside the Taxing Master's powers. Before the Taxing Master could allow the Plaintiff the costs he now claims to set off, the Defendants' costs must have been disallowed on the express ground that they were "improper, vexatious, or unnecessary." But they have been disallowed simply because there was no statutory certificate.

Moreover, it is a question whether the Court has jurisdiction

(1) 43 Ch. D. 46, 49, 50. (2) 6 Rep. Pat. Cas. 152.

to interfere at all. It has been held in *In re Mills' Estate* (1) that the *Judicature Acts* and Order LXV., rule 1, do not give the Court more discretion as to costs than before the *Judicature Acts* came into operation. Accordingly, if a Plaintiff entirely fails in his action, the Court has no power to give him any of the costs of it. Such a case as this is provided for by sect. 29, sub-sect. 6, of the *Patents Act*, the penalty on a Defendant whose objections are not certified to be reasonable and proper being merely disallowance of costs. If the Legislature had intended that he should be ordered to pay costs, they would have said so.

Marten, in reply :—

The Court has ample jurisdiction to deal with the case. *In re Mills' Estate* was a case under a special Act. We ask the Court to exercise the jurisdiction that was exercised in *Badische Anilin und Soda Fabrik* v. *Levinstein* (2).

KAY, J. :—

I am bound to say that I disagree with some part of the argument addressed to me on each side in this case, but I have arrived at a conclusion quite satisfactory to my own mind, and I will endeavour to state as shortly as I can the grounds of it.

This is a patent action. The Plaintiff's action was, at the trial, dismissed with costs. The Defendants had denied the validity of the patent, and had also denied infringement. The action was dismissed with costs, because the Plaintiff could not make out the case of infringement, and the Court declined to give any judgment at all upon the issue whether the patent was valid or not. The Defendants had delivered certain particulars of objections to the validity of the patent, and at the trial the Court was not asked to give, and did not give, a certificate that those objections were reasonable and proper. Therefore there has been no adjudication by the Court as to whether the particulars of objections were reasonable and proper or not. For anything I know, they may have been perfectly reasonable and proper. I never heard that a defendant was not entitled to have two strings to his bow—that he might not say, "I have not infringed your

(1) 34 Ch. D. 24. (2) 29 Ch. D. 366.

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patent; and even if I have, your patent is invalid." Clearly he can raise both of those issues, and because he succeeds upon one it does not reasonably follow that the other was improper or unnecessary.

Then, not having obtained any certificate under the 29th section of the *Patents, Designs, and Trade Marks Act* of 1883, although the Plaintiff was ordered to pay the costs of the Defendants, the Defendants could not recover the costs of the particulars they had delivered. That section provides—reading it shortly with reference to a defendant only—that in an action for infringement of a patent, a defendant must deliver particulars of objections, and on taxation of costs regard shall be had to the particulars delivered by the defendant; and the defendant shall not be allowed any costs in respect of any particular delivered by him, unless the same is certified by the Court or a Judge to have been proven or to have been reasonable and proper. So that in the present case the Defendants could not get any costs whatever of these particulars; and although those costs were carried in by the Defendants with a not unusual anxiety to get all they could out of the Plaintiff, the Taxing Master disallowed them *en bloc*. He said, "I disallow them because there is no certificate.'

The Plaintiff now says: "True, all these costs have been disallowed to the Defendants, and disallowed because no certificate was given; but these proceedings of the Defendants, the costs of which have been disallowed, caused me to incur very considerable costs with a view of meeting them, and I ask that these costs, or some of them, shall be allowed to me and set off against the costs which I have to pay." Well, if there is a law to that effect, it is quite right that he should have that relief. He relies upon Order LXV., rule 27, sub-r. 20, which provides shortly this: that the Court may at the trial, or upon an application in Court or in Chambers, "direct the costs of any pleading, summons, affidavit, evidence," and so on, "which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter . . . to be disallowed, or may direct the taxing officer to look into the same, and to disallow the costs thereof, . . . and in such case the party whose costs are so disallowed shall pay the costs occasioned thereby to the other parties." Then it goes

on to say that where the Court has not dealt with the matter, the Taxing Master must—not merely that he can do so, but that it is his duty to do so. But first, before the party, the costs of whose proceedings have been disallowed, can be required to pay the costs occasioned by those proceedings to the other party, there must have been a disallowance of costs—in the present case the costs of the Defendants—either by the Court or by the Taxing Master, on the ground that they are costs of proceedings which were "improper, vexatious, or unnecessary." Here the Taxing Master says: "I have disallowed the costs of all the particulars of objections, not because they are improper, vexatious, or unnecessary, but simply because the Defendants have not obtained the proper certificate." As I understand, the argument is hardly pushed so far as that all the costs occasioned by the evidence brought in support of these objections, or all the costs which the Plaintiff incurred in order to meet them, shall be allowed to him; but it is said the Taxing Master ought to look into the matter, and see whether certain of the costs occasioned to the Plaintiff by those objections should not be allowed to him. Some of these objections, it is said, were not supported by any evidence at all; that is, the Defendants did not produce any witnesses whatever to prove—to take one instance as an illustration—objection A. It is argued that if they did not produce any witnesses whatever at the trial to prove objection A, that objection must have been improper, or at least unnecessary, and accordingly that the costs occasioned to the Plaintiff by that objection ought to be allowed to him, and set off against the costs that he has to pay. That is the argument. But suppose the Court had given a certificate that that objection was reasonable, would the Plaintiff then have been entitled to the costs he is asking? To my mind it is clear he would not. The Plaintiff would not be entitled to the costs occasioned by any one of these objections if the Court had given a certificate; but the Court has not given a certificate; whether because the Court was not asked to do so, or because the Court would not go into the matter, is quite immaterial. There has been no certificate, and that is the only reason why the Taxing Master has disallowed these costs. He has not disallowed them because they were costs of particulars which

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were improper, vexatious, or unnecessary; and to entitle the Plaintiff to that which he asks, there is a precedent condition imposed by this rule, that there must have been a disallowance of costs of the Defendants because they were costs of proceedings which were improper, vexatious, or unnecessary. It seems to me that the Taxing Master is perfectly right, and that the reason he has given is perfectly right. He says: "I have not disallowed these costs of the Defendants because they were costs of improper, vexatious, or unnecessary particulars, but merely because the certificate has not been given." Therefore the precedent condition which it is necessary for the Plaintiff to make out before he can get that set-off of costs which he is now trying to get fails him. He has to shew that the costs of the Defendants have been disallowed because they were costs of particulars which were improper, vexatious, or unnecessary, and that he has failed to do. I dismiss the summons with costs.

G. I. F. C.

The Plaintiff appealed from this decision. The appeal came on for hearing on the 10th of March, 1890.

Marten, Q.C., and *Swinfen Eady*, for the appeal:—

We contend that under the Rules of the Supreme Court, Order LXV., rule 27, sub-rule 20, where no direction is given by the Court, it is the duty of the Taxing Master to see whether any proceeding is "improper, vexatious, or unnecessary": *In re Wormsley* (1). Under the *Patents, Designs and Trade Marks Act*, 1883, sect. 29, sub-sect. 6, the costs of objections are not to be allowed unless they are certified to be reasonable and proper; but if no certificate is given, that does not preclude the Taxing Master from looking into the matter to see whether they were not vexatious or improper, so as to entitle the opposite party to the costs which they have occasioned to him. No direction at all having been given by the Judge, the Taxing Master ought to consider the matter. If this decision stands, the defendant may cause enormous expense to the plaintiff by unfounded objections, and the plaintiff will have no remedy. It may be urged that where the Court of Appeal finds that a patent case

(1) 27 W. R. 36.

can be decided on one short ground it will not go into the rest of the case; but the Taxing Master is in an entirely different position. There is a discretion as to giving an unsuccessful party costs as to issues on which he was in the right: *Badische Anilin und Soda Fabrik* v. *Levinstein* (1). If the mere fact that there was no certificate is to preclude the Taxing Master from entering into the question, gross injustice will be done. One objection was withdrawn after cross-examination of the witness called in support of it. There were others as to which the Defendants adduced no evidence; others were supported by evidence which the Judge stated that he did not believe. This is strong *primâ facie* evidence that the objections were unreasonable.

Aston, Q.C., and *Chadwyck Healey*, for the Defendants:—

The case is governed by sect. 29, sub-sect. 6 of the *Patents Act* and not by Order LXV., rule 27, sub-rule 20. All that the statute intended was that if a party took objections which were not reasonable he should not get costs in respect of them, and this enactment is exhaustive. But supposing sub-rule 20 to be applicable, it can, in the absence of directions by the Court, be applied only where a bill of costs is before the Master which he has jurisdiction to tax. Here the Master had no jurisdiction to tax the Defendants' costs in respect of the particulars of objection, and he could not enter into the question whether the proceedings which occasioned them were improper or vexatious. In *Boyd* v. *Horrocks* (2) the Court of Appeal declined to go into objections for the purpose of deciding as to the costs of them, and, *à fortiori*, the Taxing Master cannot enter into the question. *Foster* v. *Great Western Railway Company* (3) is against the jurisdiction to give these costs. We submit that Mr. Justice *Kay* was right in holding that it is a condition precedent to the Plaintiff's claiming these costs that the Defendants' costs should have been disallowed on the ground that the particulars of objection were vexatious or improper; and as they have been disallowed on another ground, the question whether they were vexatious or improper cannot now be entered into.

Marten, in reply.

(1) 29 Ch. D. 366, 417. (2) 6 Rep. Pat. Cas. 152. (3) 8 Q. B. D. 515.

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March 20. COTTON, L.J.:—

This case comes before us on appeal from the refusal of Mr. Justice *Kay* to review the Taxing Master's certificate. The action is by a patentee, and the Defendants took various objections to the validity of the patent, on none of which did the Court give any decision, the case being decided in favour of the Defendants solely on the ground that there had been no infringement. No certificate was applied for or given that the particulars of objections or any of them were reasonable and proper. The action having been dismissed with costs, the Defendants carried in a bill including their costs incurred in respect of the particulars of objection. The Taxing Master did not enter into consideration of these costs, but disallowed them as a whole, by reason of the enactment in the *Patents, Designs and Trade Marks Act*, 1883, sect. 29, sub-sect. 6, that a party is not to be allowed any costs in respect of a particular of objection unless the Court certifies it to have been proved or to have been reasonable and proper. The Plaintiff then brought in a bill of costs incurred by him in respect of the Defendants' particulars of objection, relying on Order LXV., rule 27, sub-rule 20. The Taxing Master declined to tax the bill, being of opinion that as he had no power to tax the Defendants' bill of costs in respect of the particulars of objection, he had no power to consider whether those particulars were reasonable and proper. If they had been found to be improper, then, according to sub-rule 20, the Defendants would have had to pay to the Plaintiff the costs occasioned to him by them, but the Taxing Master thought that he had no power to enter upon the question whether the particulars of objection were improper, and that it was only on their being decided to be improper that he could enter upon the question of the costs occasioned to the Plaintiff by them. Mr. Justice *Kay* took the same view, and held that the rule imposed a condition precedent that the Defendants' costs must have been disallowed on the ground that the proceedings in respect of which they were incurred were improper, vexatious, or unnecessary. In this I think the learned Judge was right. It is contended that these particulars must have been improper and vexatious, because no certificate was applied for. If no certificate is obtained the Defendants cannot

get their costs in respect of them, but it does not follow that because no certificate has been given the particulars are to be treated as improper, vexatious, or unnecessary, so as to bring the case within sub-rule 20. This may seem hard on the Plaintiff, but he has taken a wrong course. If he wished to raise this question he ought to have asked the Judge to direct the Taxing Master to look into the question whether any costs had been incurred by the Plaintiff in consequence of any proceedings improperly taken by the Defendants. If no special direction is given by the Court, the Taxing Master may, under sub-rule 20, enter into consideration of the question whether any of the costs which are before him for taxation were incurred in respect of unnecessary, improper or vexatious proceedings, and if he finds that any of them were so incurred, then, under sub-rule 20, he can enter into the consideration of the costs occasioned by such proceedings to the opposite party, but here the Defendants' costs of the particulars cannot be considered as having been before the Taxing Master at all, and he therefore could not enter into the question whether they were incurred in respect of improper proceedings. In such cases parties must see to obtaining a direction from the Judge. The appeal must be dismissed.

LINDLEY, L.J.:—

Order LXV., rule 27, sub-rule 20, is general, not referring to patent actions in particular, and there is a difficulty in applying that rule to the case of particulars of objection which are specially dealt with by the *Patents, Designs and Trade Marks Act* of 1883, sect. 29, sub-sect. 6. I feel some difficulty in the case, but do not dissent from the view taken by the Taxing Master, Mr. Justice *Kay*, and the Lord Justice *Cotton*. I am disposed to think that view correct, and it certainly is much better that directions should be given by the Judge who knows all about the case, than that the question should be left to the Taxing Master, who knows nothing of the proceedings.

LOPES, L.J.:—

The case turns on the construction of Order LXV., rule 27, sub-rule 20, and upon its true construction I think that, having

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regard to what took place in the action, and to sect 29 of the *Patents, Designs and Trade Marks Act*, 1883, the view of the Lord Justice *Cotton* is right that the Taxing Master had no jurisdiction to enter into this question. The appeal, therefore, fails.

Solicitors: *Francis & Johnson; Robinson, Preston, & Stow.*

H. C. J.

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In re HARGREAVES.
DICKS *v.* HARE.

[1889 H. 4329.]

Practice—Administration Summons—Creditor—Annuitant—Proof for future Debt—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10 [*Revised Ed. Statutes, vol. xvii., p.* 740]—*Rules of Supreme Court*, 1883, *Order* LV., *r.* 3.

A testator by deed covenanted with trustees to pay an annuity to a woman during her life, to be considered as accruing from day to day, by equal quarterly payments. The testator's estate was not sufficient to pay the estimated value of the annuity as well as his other debts and liabilities, and the trustees took out an originating summons under Order LV., r. 3, as creditors for administration of the estate. At the time when the summons was taken out no quarterly payment of the annuity was due:—

Held (affirming the decision of *North*, J.), that the trustees of the annuitant were not creditors of the testator, and could not take out a summons for the administration of the estate; although if an administration order was obtained by some other person they would be entitled to prove for the estimated value of the annuity.

By an indenture dated the 19th of January, 1887, *Ernest Hargreaves* covenanted to pay to the Plaintiffs, as trustees for Mrs. *A. H. Dicks*, an annuity of £500 during her life, to be considered as commencing from the 25th of December, 1886, and accruing from day to day, by equal quarterly payments on the usual quarter days in each year with a proportionate part in the event of her death during any current quarter.

E. Hargreaves died on the 21st of October, 1889, and the Defendants were the executors of his will. No arrears of the annuity were due at the time of his death. His estate, after payment of funeral and testamentary expenses, amounted to about £4350; and his debts and liabilities exclusive of the claims of the Plaintiffs

amounted to about £1860. The value of Mrs. *Dicks'* annuity was estimated at £8386. Under these circumstances the Plaintiffs, on the 13th of December, 1889, took out an originating summons as creditors against the executors for the administration of the testator's real and personal estate.

On the 23rd of December, the executors paid the Plaintiffs £125 for the quarter's payment of the annuity which would become due on the 25th of December.

On the 27th of January, 1890, the summons was heard by Mr. Justice *North* in Chambers, when his Lordship dismissed the summons with costs, holding that the Plaintiffs were not creditors, there being no debt due to them, and also being of opinion that he had a discretion under Order LV., r. 10, and did not think it a proper case for making an order for administration.

The Plaintiffs appealed from this decision, the Judge having given a certificate that he did not desire to have the case further argued.

Maclean, Q.C., and *S. Dickinson*, for the Appellants:—

It is beyond dispute that if the value of our annuity be taken into account the testator's estate is insolvent. If therefore the estate was being administered by the Court the annuity would have to be valued, and we should be entitled to prove for the amount under the 10th section of the *Judicature Act*, 1875, in accordance with the practice of the Court of Bankruptcy: *Bankruptcy Act*, 1883, s. 37, sub-ss. 3, 7. We are therefore creditors and have a *locus standi* to bring an action or take out a summons for administration and obtain a decree. The annuity is payable "from day to day" by the express terms of the deed, so that although the executors may pay the quarterly payments as soon as they become due there is really a present debt accruing day by day. Even before the *Judicature Act* an annuitant might in some cases obtain a decree for administration, for it was not necessary that the debt of the creditor who filed a bill for administration should be such a debt as would support an action at law. It was sufficient if it was *debitum in præsenti solvendum in futuro*: *Whitmore* v. *Oxborrow* (1), *Blount* v. *Hipkins* (2), *Read* v.

(1) 2 Y. & C. Ch. 13. (2) 7 Sim. 51; 4 L. J. (N.S. Ch.) 13.

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Blunt (1), *Norman* v. *Johnson* (2), *Burrell* v. *Delevante* (3), *Thomas* v. *Griffith* (4). But here we have a statutory right of proof, and it would be an unreasonable construction of the Act to hold that the executors can prevent us from availing ourselves of our statutory right by refusing to obtain an administration order. The principle of the administration of the assets must be the same whether it take place in Court or out of Court. And now the rules have extended the class of those who may obtain an administration order, for by Order LV., r. 3, an administration summons may be taken out by any one "claiming to be interested as a creditor"; and that a wide interpretation is to be put on the word "claim" is shewn by the rules 44, 46, 46A, of the same order as to advertisements for creditors and claimants.

Mr. Justice *North* said that he had a discretion whether to make an administration order or not. We contend that he had no such discretion, but was bound to make an order if we proved our claim as creditors; for we have no other remedy, and the question is one of law: *In re Powers* (5), *Wollaston* v. *Wollaston* (6).

Buckley, Q.C., and *Farwell*, for the Defendants were not called on.

COTTON, L.J.:—

The question here is whether Mr. Justice *North* was right in refusing to grant an administration decree. It is put in this way, that under the 10th section of the *Judicature Act* of 1875 there is a right to prove, in the event of an administration order being granted, for the value of this annuity; and then it is said that that enables the trustees for this lady, although of course they have not any right independently, as I read the Act, to have a value put on this annuity. Independently of this section the executors could not pay the annuitant, whether the estate was solvent or insolvent, the value ascertained by the tables; that was not the liability, and they could not pay that; but they must

(1) 5 Sim. 567.
(2) 29 Beav. 77.
(3) 30 Beav. 550.
(4) 2 D. F. & J. 555.
(5) 30 Ch. D. 291.
(6) 7 Ch. D. 58.

wait and pay the sums from time to time as they become due. And under the Act, so far as I can see, the right to prove for the value of the annuity, as properly ascertained, is dependent on an administration order being granted. The section says this:—"In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the *Companies Acts*, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail" (among other things) "as to the valuation of annuities as may be in force for the time being under the law of bankruptcy." That is to say, when the Court is administering the assets of a deceased person whose estate is insolvent, it enables this valuation to be made, and enables the person entitled to the benefit of the annuity to prove for the value as so ascertained. In my opinion that gives no greater right to the annuitant or her trustees to bring an action than they would have had independently of this section. It is very true that when there is an administration order—that is to say, when the Court is administering the assets—it then enables the value of that annuity to be ascertained as it would be in bankruptcy, and proof may be made for that sum. I do not know what the view of Parliament was; it might be this, that the probability was, if the estate was insolvent, that some creditor would obtain an administration order, or, if no creditor obtained an administration order, that the executors for their own protection would do so. But, however that may be, if the Act of Parliament does not give the annuitant a greater right than he had before for the purpose of getting an administration order, we cannot give it him.

What debt could the trustees who applied for this administration order have proved as due to them? It is said that this annuity must be considered as accruing *de die in diem*. Yes; but that was to meet that which is provided for otherwise by the *Apportionment Act*, giving the trustees in case of this lady's death a right to prove for the accrued portion of the annuity considering it as an interest accruing *de die in diem*. In my opinion, as

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there is no claim which can be sued for now, as for a sum which is due, the executors having paid the full amount of each quarterly payment as it became due, there can be no right to bring an action at law against the executors, and, therefore, no right to an order for the administration of the estate. I am simply dealing now with this section of the Act of Parliament. It may be that this matter was never thought of by the Legislature when it passed the Act, or it may be that the Legislature did not intend to give the annuitant a right independently of there being an administration by the Court, although, if that had been done, there would be a right to come in and prove.

Then it was said that we must look at the rules and orders, and rule 3 of Order LV. was very much relied on. That is an order enabling certain things to be done on an originating summons which without this order could only be done on action brought. It is said here that an originating summons for the administration of the estate in the nature of a creditor's action may be filed by any person "claiming to be interested as a creditor," and the Plaintiffs say, "We claim to be interested as creditors." But in my opinion they cannot rely on that rule as giving them, if they are not otherwise entitled to an administration order on action brought, a right to obtain it by originating summons. If they claim as creditors and are not creditors, it cannot be said this rule intended to give them a right which they can only have if they are creditors; it cannot mean that a person can come and say wrongfully, "I claim as creditor; therefore I am entitled to this order."

Then other rules are referred to which provide for advertisements for creditors and other claimants, and it is said they shew that these trustees for this lady could come in and prove the debt. So they could; but although in the latter rule the advertisement may be answered, yet it does not mean that we are to construe this rule 3 so as to enable claimants to come in and obtain an administration order as if they were in the same position as creditors entitled under the old law to get a decree for the administration of the estate. It may be a mistake of Parliament, or it may be intentionally done, not to give any right except when there is an administration order; but in my opinion

neither by this Act, nor by force of these rules, can the trustees of this annuitant, as long as what is due to them is paid, come and get an administration order so as to enable them to get the benefit of the rights which they can only get if an administration order is granted.

Then it was said that the cases help the Appellants. It is admitted that there is no case in which a person who is not entitled to say that he or she is a creditor has ever got an administration order. The first case, and I think the best for the Plaintiffs, was that of *Whitmore* v. *Oxborrow* (1). In that case there was a debt of £3000 cash, and £2592 cash too, but cash secured by bills of exchange payable at a future time. There was a sum *debitum in præsenti solvendum in futuro;* and, although that was, perhaps, rather a strong decision of Vice-Chancellor *Knight Bruce,* yet it does not at all apply to this case, where there is no debt due at all to the annuitant, who is simply entitled upon a covenant to pay her this annuity from time to time as long as she lives. That, in my opinion, will not enable us to make the order asked for.

The only other case I need refer to is that of *Blount* v. *Hipkins* (2). What the Vice-Chancellor there decided was, that, having regard to the terms of the will and the property left by the will, the liability, although not then due, and not constituting in law a debt, might be considered a debt within the meaning of the will which he had to construe. Here we have to say whether this is a debt which will support a decree for administration, not whether, within the terms of a certain will which we have to construe, and having regard to the property which has been dealt with, this annuity was intended to be provided for by the will of the testator. That case does not help us either; and the other cases which were referred to, if they were rightly decided, would not justify us in making the decree here asked for.

In my opinion the case fails, and the appeal must be dismissed.

LINDLEY, L.J.:—

I am unable to come to any other conclusion, though one cannot help feeling struck with the curious state in which the law

(1) 2 Y. & C. Ch. 13. (2) 7 Sim. 51; 4 L. J. (N.S. Ch.) 13.

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is as regards this matter. The Act of Parliament, after all, is the thing which we must look to for the purpose of determining this question. Great reliance has been placed on Order LV., rules 3 and 4; but notwithstanding all that has been said about those rules I cannot understand them as doing more than enabling persons who might obtain relief by bill to get the same relief by summons. They do not create creditors or claimants or anything of that sort; and we are thrown back on the Act of Parliament, the *Judicature Act*, 1875, s. 10. That repeals a previous section in the *Judicature Act* of 1873, and I have looked at that to see what the alteration was. The alteration in reference to this point is immaterial. Under the old Act the section ran, "In the administration by the Court of the assets," and so on; and so it does here. What Parliament has done must be looked at, and what it has not done must be looked at. Let us take the last first. Parliament has not in any way affected the administration of assets, except in legal proceedings. It leaves executors to administer assets out of Court just as they did before; but it says that when you come to administer assets in Court, whether under a winding-up or in bankruptcy, or under an administration order or decree, certain modifications shall be made. Certain alterations are made, and, speaking generally and rather roughly, it says that as regards debts provable and the valuation of contingent debts and so on, the rules in bankruptcy are to apply—that is to say, there is to be one set of rules observed by the Court, whether in bankruptcy or in windings-up or administrations. It says nothing about the duties of executors where there is no administration in Court. Here, unfortunately for the Appellants, there is no order or decree for the administration of this estate by the Court, and the reason is obvious enough, namely, that the executors are in a position to pay all the creditors 20*s.* in the pound; and there never will be, so far as I can see, any decree or order for administration. The effect of that upon the present Appellants is curious. If there were a decree for administration, then, under this Act of Parliament, this lady would be entitled to say, "Value my annuity and give me the value of it." As there is no such decree for administration, she is not entitled to that, but only to be paid her annuity

as it becomes due, and in time I suppose there will be a deficiency of assets, if she lives long enough; and it does seem strange that her right should be made to depend on whether there is an administration order or not. But that is an anomaly not peculiar to this case. We all know that, until an order is made for administration, executors can prefer one creditor to another to an extent to which they cannot after proceedings have been commenced. That seems to be the case still; the Act of Parliament has not said that executors shall out of Court observe the same rules as they are to observe in Court.

In my opinion this appeal fails, and must be dismissed.

LOPES, L.J.:—

The trustees for this lady are not entitled to an administration decree unless they can establish a provable debt. They have no provable debt, and, therefore, cannot be considered to rank as creditors. All that is due has been paid each quarter day.

Reliance was placed on rule 3 of Order LV. That rule, in my opinion, only applies to that which, before the rule, would have been the subject-matter of an administration action, and does not extend relief further than it would have been obtained by a bill for administration. As has been observed, the state of the law is somewhat anomalous and presses no doubt harshly on this lady; but that is a matter for which this Court is not responsible. I think the appeal fails.

Solicitors: *Winter & Co.; Tathams & Pym.*

M. W.

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KEKEWICH, J.
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BUCKLE *v.* FREDERICKS.

[1889 B. 5544.]

Covenant against Carrying on Trade—"Trade of Retailer of Wine, Spirits or Beer."

The lessee of a theatre bought an adjoining piece of ground, which was subject to a covenant, of which he had notice, that "the trade of an innkeeper, victualler, or retailer of wine, spirits or beer," should not be carried on there. He erected on this piece of ground a building the object of which was to furnish convenient egress from the theatre; but on each floor he set up a counter for selling wine, spirits and beer, which could not be approached directly from the outside, but at which any person who paid for admittance to the theatre when open for theatrical performances could purchase refreshments:—

Held (affirming the decision of *Kekewich*, J.), that the lessee was carrying on the trade of a retailer of wine, spirits and beer, and must be restrained from doing so.

Jones v. *Bone* (1) distinguished.

THE Defendant was the lessee of a theatre at *Stratford*, in *Essex*. In June, 1887, he purchased from *W. Purkis* the fee simple of a plot of land adjoining the theatre, and built upon it an extension containing a staircase to provide additional exits from the theatre in case of fire, and on each floor of this extension he set up a refreshment bar for the sale of wine, spirits, and beer to persons frequenting the theatre. There was no entrance from the outside to any of these bars, and no one could obtain access to them without entering the theatre during the time of theatrical performance, which could only be done on payment of the regular charge for admission to the theatrical performance. The lowest charge for admission was sixpence.

This plot had been formerly part of an estate put up for sale by auction in 1880, by the *British Land Company*, in lots, subject to restrictive conditions, *Purkis* being the purchaser of the plot at such sale. In the conveyance to *Purkis*, which was dated the 21st of January, 1880, these conditions were referred to, and *Purkis* covenanted with the company and with the owners of the other lots to observe them as to the piece of land conveyed to

(1) Law Rep. 9 Eq. 674.

him. The condition on which the present question turned was as follows:—

"Trades, &c., prohibited. No public-house, beerhouse, or house for the sale of beer wine or spirituous liquors shall be erected, nor shall the trade of an innkeeper, victualler or retailer of wine spirits or beer be carried on upon any lot."

It was not disputed that the Defendant had notice of this covenant at the time of his purchase.

The Defendant obtained a special license under 5 & 6 Will. 4, c. 39, s. 7, for the sale of beer, spirits and wine in the theatre. This action was brought by two persons who had purchased some of the other lots to restrain the Defendant from carrying on the trade of a victualler or a retailer of wine spirits or beer on the lot which he had purchased, and the Plaintiffs now moved for an interim injunction accordingly.

The motion was heard before Mr. Justice *Kekewich* on the 21st of March, 1890.

Marten, Q.C., and *Swinfen Eady*, for the Plaintiffs.

Haldane, Q.C., and *Chubb*, for the Defendant, contended that the prohibition contemplated by the covenant was that of the trade of an ordinary public-house keeper, and did not extend to a mere sale of refreshments as ancillary to the Defendant's ordinary trade of a theatre proprietor: *Jones* v. *Bone* (1).

KEKEWICH, J.:—

This is a mere question of the construction of this covenant as applicable to the circumstances of this case. It seems to me that something else is prohibited beyond a mere public-house trade in beer, wine and spirituous liquors. It is not suggested that the Defendant is carrying on the trade of an "innkeeper"; but it is said he is carrying on the trade of a retailer in wine, spirits or beer. He has a theatre to which the extension he has built is annexed, and this extension he finds he can conveniently use for the purposes of a refreshment-bar for the persons resorting to the theatre. It is open to all those who pay the regular

(1) Law Rep. 9 Eq. 674.

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charge for admission to the theatre. I leave out of consideration the possibility of the general public obtaining access to the bar, but all persons frequenting the theatre can obtain access to it and can indulge as much as they please in such refreshments as are sold there, including the wine, spirits and beer which are sold over the counter. I am at a loss to understand how that is not carrying on a trade in wine, spirits or beer.

The argument on the part of the Defendant is based upon the decision of Lord Justice *James*, when Vice-Chancellor, in *Jones* v. *Bone* (1), who held that a grocer who was selling wines and spirits in bottle, in the course of his trade, was not committing such a breach of a covenant not to carry on the business of a seller by retail of wines and spirits as the Court would interfere with. Under the new excise laws passed since the date of the covenant in that case, a new line of business had sprung up which the Vice-Chancellor thought was not the sort of thing which was intended to be provided against. The sale by the defendant of wines and spirits was, so to speak, an accidental addition to his trade as a grocer. The present case is, in my opinion, entirely different from that. It is true that the principal part of the Defendant's business is not that of a retailer of wine, spirits or beer; but he is, nevertheless, carrying on a business of that kind. In my opinion, therefore, the Defendant is carrying on "the trade of a retailer of wine, spirits or beer," and in doing so he is committing a breach of the covenant. The Plaintiffs are, therefore, entitled to an injunction.

G. I. F. C.

C. A

From this decision the Defendant appealed.

The appeal was heard on the 28th of March, 1890.

Haldane, Q.C., and *Chubb*, for the Appellant:—

This case is governed by *Jones* v. *Bone*. The covenant is not against any sale of wine spirits and beer by retail, but against the carrying on the trade of selling them, a well-known trade associated in the covenant with that of an innkeeper. The sale here is only for the accommodation of the frequenters of the

(1) Law Rep. 9 Eq 674.

theatre; we do not supply the public. In the case of a club, could the supplying liquors to the members be held an infringement of such a covenant as this?

[COTTON, L.J.:—There being a covenant against the erection of a house for the sale of liquors, ought we to allow a house on the land to be used for that purpose?]

The statement of claim does not make that case, nor is the injunction directed to it. The whole covenant comes under the head of "trades prohibited;" its scope is to forbid the establishment of a public-house or anything in the nature of one.

Marten, Q.C., and *Swinfen Eady*, for the Plaintiffs:—

This case is similar to *Bishop of St. Albans* v. *Battersby* (1). The principle in the case of a club is shewn by *Graff* v. *Evans* (2), there is in that case no sale: *London and Suburban Land and Building Company* v. *Field* (3), follows *Bishop of St. Albans* v. *Battersby*. *Jones* v. *Bone* (4) went on this, that the covenant was intended to prohibit a trade well known at the time, and that the Defendant's carrying on a new business occasioned by an alteration in the law was not within it. In the present case the Defendant is clearly carrying on the trade of a retailer of wines and spirits, though it is not his principal trade.

Haldane, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich*, who has granted an injunction to restrain the Defendant from carrying on the trade of a retailer of wine spirits or beer on certain property. The Defendant is proprietor of a theatre. Better means of egress being required, he pulled down a house adjoining the theatre, and erected a building of considerable height by which egress from the different floors could be had, and he so arranged it that on each floor there was a counter at which wine, spirits, and beer were sold to the persons frequenting the theatre.

(1) 3 Q. B. D. 359.
(2) 8 Q. B. D. 373.
(3) 16 Ch. D. 645.
(4) Law Rep. 9 Eq. 674.

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I think that this was a carrying on by the Defendant of the trade of a retailer of wine, spirits and beer. He says he is not carrying on that business, but the business of a theatrical manager. It is true that the latter is his principal business, but I cannot admit that he does not also carry on the business of a retailer of wines, spirits, and beer.

The Appellant relies on the case of *Jones* v. *Bone* (1). I do not understand Lord Justice *James* to have decided in that case that there was no breach of covenant, but only that there was no case for an injunction. Here the Defendant is selling wine, spirits and beer by retail, and that in the way of business, and, in my opinion, he is carrying on the trade of a retailer of them.

LINDLEY, L.J.:—

The Defendant holds the land on which this annex is built subject to a covenant that no public-house, beerhouse or house for the sale of beer wine or spirituous liquors shall be erected thereon, nor shall the trade of an innkeeper, victualler or retailer of wine spirits or beer be carried on upon it. Now what is the Defendant doing? He is selling by retail wine spirits and beer on every night in the year except Sunday. He sells to any one who goes there by a specified entrance, and everybody who pays entrance-money for admission to the theatre can buy refreshments at those counters. There is no doubt that the Defendant would have been a trader under the old bankruptcy law. It is true that the Defendant is only carrying on this trade as ancillary to his other business, but still he is carrying on the trade. It is urged that the case is governed by *Jones* v. *Bone*, but I think that it is not. In that case, owing to an alteration in the excise laws, a grocer became entitled to sell wine in bottles. It was held that in so doing he was not violating a covenant, which had been entered into under a different state of the law, restraining him from carrying on the trade of a retailer of wine—a well-known business quite different in character from the new business of the sale of wine in bottles by grocers. Draftsmen put in express words to cover the cases they think of; but knowing that there may be other cases they put in general

(1) Law Rep. 9 Eq. 674.

words to cover the cases they do not think of. Here I think that the general words hit the case.

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LOPES, L.J.:—

The Defendant has three refreshment-bars, at which any one may be supplied who pays 6*d.* for admission to the theatre. No doubt the Defendant's principal business is that of a theatrical proprietor, but a man may carry on several trades at once. Do the facts here bring the case within the words of the covenant—is the Defendant carrying on the trade of a retailer of wine, spirits and beer? I think he is, and I doubt whether he does not get as much profit from this business as from the theatre. Cases have been referred to; but I think that the present case must be determined on the true interpretation of the covenant, and that decisions in other cases do not help us.

Solicitors: *Russell; M. B. King.*

H. C. J.

TUCKER *v.* NEW BRUNSWICK TRADING COMPANY OF LONDON.

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April 2.

[1890 T. 398.]

Practice—Injunction—Undertaking as to damages.

An action was brought against *M.*, *L.*, and the *N. B. Company*, to restrain the company from confirming in general meeting certain agreements between the company and *M.* and *L.* An *interim* injunction was granted. *M.* asked for the usual undertaking as to damages, to which the Plaintiff's counsel replied that it would of course be given. *L.* had not been served, and did not appear. The Registrar drew up the order, with an undertaking confined to damages sustained by the company, and it was passed and entered in this form. *M.* and *L.* appealed, asking that the undertaking might be extended to damages sustained by them respectively:—

Held, that as *M.* had applied for an undertaking as to damages which had been given, the order was wrong in not extending the undertaking to damages sustained by him, and must be corrected.

An undertaking as to damages is not to be confined to damages sustained by the party against whom the injunction is granted.

But *held* that, as *L.* had not applied for an undertaking, the undertaking

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could not be extended to include him, the Court having no jurisdiction to compel a party to give an undertaking.

Held, that an application to correct the order ought to have been made to the Court below, the Judge having jurisdiction to correct an order, though passed and entered, if it does not express what he intended, and that as extra expense was occasioned by coming to the Court of Appeal, no order would be made as to costs.

THE Plaintiff, who was a shareholder in the *New Brunswick Trading Company of London*, deposed that he had given a guarantee for the company on the faith of certain agreements, dated in November, 1887, and January, 1888. In March, 1890, he commenced this action against the company, *J. T. Matthews, Lamplough & Co.*, and the *Bank of Montreal*, claiming an injunction to restrain the *New Brunswick Company* from confirming in general meeting on the 7th of March, 1890, or at any adjournment thereof, or at any subsequent meeting, an agreement of the 26th of February, 1890, between *C. E. Lamplough* of the first part, *J. T. Matthews* of the second part, *W. Lamplough & Co.* of the third part, and the *New Brunswick Company* of the fourth part. or another agreement of the same date between the *New Brunswick Company* and *J. T. Matthews*, and an injunction to restrain *Matthews* and the *New Brunswick Company* from registering either of the agreements in *Canada* as a document affecting or dealing with any landed property of the company in *Canada*.

On the 6th of March, 1890, the Plaintiff applied *ex parte* for an injunction. Mr. Justice *Chitty* declined to grant an injunction *ex parte*, but gave leave to serve short notice of motion for the following day. The notice was then served on the *New Brunswick Company* and *Matthews*, and on the 7th of March the motion was opened. Mr. Justice *Chitty* ordered it to stand over till that day week, granting an *interim* injunction extending over that day to restrain the *New Brunswick Company* from passing any resolution approving or confirming either of the agreements of the 26th of February without having previously obtained the consent of the *Bank of Montreal*. At the close of the discussion, *Stokes*, for *J. T. Matthews*, asked for "the usual undertaking as to damages," to which the Plaintiff's counsel replied, that of course it would be given. The Registrar drew up the order with the following undertaking: "The Plaintiff, by his counsel, under-

taking to abide by any order, this Court may make as to damages in case the Court shall hereafter be of opinion that the Defendants, the *New Brunswick Trading Company of London, Limited*, shall have sustained any by reason of this order which the Plaintiff ought to pay." Some discussion took place before the Registrar whether the undertaking ought not to extend to damages which might be sustained by *Matthews*. The Registrar thought not, and the order was passed on the 12th, with an undertaking in the above form.

On the 14th of March the motion came on again, and was directed to stand over, no order being made. A petition had in the meantime been presented by the *Bank of Montreal* to wind up the company.

On the 18th of March *Matthews* and *Lamplough & Co.* gave notice of appeal, asking that the order of the 7th of March might be reversed or varied, so far as it limited the undertaking given by the Plaintiff to damages sustained by the company, and that the undertaking might be extended so as to include damages sustained by *Matthews* and *Lamplough & Co.*, or either of them.

Stokes, for the Appellants.

Alexander Young, for the Plaintiff:—

There is no precedent for requiring an undertaking as to damages to anyone but the person against whom the injunction is granted. The undertaking as to damages to *Matthews* and *Lamplough* was not given below, and the Court of Appeal cannot impose it now. The "usual undertaking" means an undertaking as to damages sustained by the party injoined.

Stokes, in reply:—

Justice requires that an undertaking should extend to every one who may be damnified by the injunction if improperly granted. As regards *Matthews*, the undertaking was given below, and it was only the Registrar's mistake that prevented its being embodied in the order. As regards *Lamplough*, the order was *ex parte*, and his not having asked for an undertaking ought not to prejudice him, as he had not been served. The undertaking

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as to damages was first introduced in *ex parte* motions for injunctions when there was no one to ask for it.

COTTON, L.J.:—

This is an appeal under unusual circumstances. The Plaintiff applied for an injunction against the company, which was granted on the terms of the Plaintiff giving the usual undertaking as to damages. The company and *Matthews* appeared at the hearing of the motion. When the discussion was at an end, counsel for *Matthews* asked for the usual undertaking as to damages, and the Plaintiff's counsel said it would of course be given. The order was passed and entered with an undertaking only as to damages that might be incurred by the company. I think this was wrong. Counsel for *Matthews* had applied for and obtained an undertaking for damages, and it ought to have been embodied in the order. That gets over, as regards *Matthews*, the objection that he is applying for an undertaking which had not been given. It was given, and ought to have been inserted in the order.

As regards *Lamplough*, I am of opinion that his appeal fails; for we cannot impose on the Plaintiff any undertaking which he has not given. If a defendant applies for an undertaking, the plaintiff may decline to take any order. The Court only makes the undertaking a condition of granting an injunction; if the plaintiff refuses to give it the Court can refuse the injunction, but it cannot compel the plaintiff to give an undertaking.

As a general rule, I think that when an injunction is granted the undertaking as to damages ought not to be confined to the persons restrained. In *Pemberton* on Decrees (1), it is said: "The undertaking applies to all the Defendants, although one or more only may be restrained." Mr. *Pemberton* does not refer to any authority for this; but I consider it to be a correct statement of the practice.

If Mr. Justice *Chitty* had been applied to, he might have set this matter right; for though the order had been passed and entered, he had jurisdiction to correct it as not rightly expressing the order he had made. Extra costs have no doubt been occasioned by coming here, and I think that we ought to give no costs to either party.

(1) 4th Ed. 435.

LINDLEY, L.J.:—

The cases of the two Appellants are distinguishable. *Matthews* asked for an undertaking and got it. An undertaking is the price of an injunction, and if a man gets an injunction he must pay the price. *Lamplough* did not ask for an undertaking, and for anything we can tell, if he had done so the Plaintiff would have declined to take an injunction. I think, therefore, that the undertaking can only be extended to *Matthews*. I agree as to the costs.

LOPES, L.J.:—

I am of the same opinion.

Solicitors: *Parker, Garrett & Parker; Kearsey, Hawes & Walsh.*

H. C. J.

In re DAVIES.
ISSARD *v.* LAMBERT.

[1888 D. 243.]

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April 15.
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April 23

Chambers — Evidence — Accounts — Cross-examination of Party — Close of Evidence.

It is competent for the Judge to adopt a practice in Chambers excluding further evidence by a party after cross-examining on the evidence of the other side.

BY the judgment in this action dated the 14th of March, 1889, an order was made to compute interest on £1344, the amount of the testator's residuary estate, as to one moiety from the 8th of December, 1865, and as to the other from the 17th of February, 1877. An account was directed of all sums paid by the Plaintiff, his executor, to *E. H. Davies* the younger, or to the Defendants, his executors, in respect of such residuary estate, and an inquiry was directed what ought to be allowed in the account of the Plaintiff for moneys paid or expended by him for the maintenance, support, and education of *E. H. Davies* the younger during his minority.

On the 4th of June, 1889, the Plaintiff brought in an account, which he verified by affidavit. This account was considered in-

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sufficient, and on the 2nd of July the Plaintiff was ordered to bring in a supplemental account. This he did, the last affidavit in support being filed on the 24th of October.

On the 26th of November, 1889, the Defendants took out a summons for leave to cross-examine the Plaintiff on the above affidavits, and on the 30th of November the summons came on before the Chief Clerk. The Plaintiff's solicitor then said to the Defendants' solicitor that if an order for cross-examination was made, the Defendants would not be able to file any evidence. The Defendants' solicitor, however, asked for an order, and it was made, nothing being said by the Chief Clerk as to the Defendants not being at liberty to adduce evidence.

On the 17th of February, 1890, three affidavits were sworn on behalf of the Defendants, but not filed. On the 18th the cross-examination commenced, and was concluded on the 22nd. On the 28th the Defendants obtained an appointment before the Chief Clerk for directions as to filing evidence, and on the 6th of March he refused to give any directions as to filing evidence, considering that the Defendants ought not to be allowed to file any.

The Defendants on the 18th of March took out a summons to have it declared that they were entitled to file evidence in answer to inquiries and on the accounts delivered by the Plaintiff, or in the alternative that they might be at liberty to file evidence, notwithstanding that the cross-examination of the Plaintiff had taken place. Mr. Justice *Chitty* in Chambers refused the application. The Defendants moved to vary this order.

The motion came on before Mr. Justice *Chitty*, on the 15th of April, 1890.

Swinfen Eady, for the motion:—

The Chief Clerk refused to allow further evidence to be adduced in accordance with what he alleged was the settled practice in Chambers, that cross-examination only takes place after the evidence is closed: *Muir* v. *Kirby* (1). I submit that there is no such rule Under the old practice there was no rule that you abandoned your right to put in evidence by cross-examining one of the deponents: *Clarke* v. *Law* (2). An account-

(1) 32 Sol. J. 130. (2) 2 K. & J. 28.

ing party may be cross-examined on his affidavit at any time: *Meacham* v. *Cooper* (1). No time had been fixed for filing evidence in this case; I admit that when a time has been fixed fresh evidence cannot be adduced without special leave, but the rule does not apply where no time has been fixed: *In re Chifferiel* (2).

[CHITTY, J., referred to Order XXXVII., rules 21, 22, and Order XXXVIII., rules 25–28.]

The Plaintiff should have applied to fix a time: he has not done so.

Romer, Q.C., and *MacSwinney*, for the Plaintiff:—

The evidence in the present case must be taken to have closed prior to cross-examination; that is the practice now in Chambers, and it is well settled. The Defendants did not make out any special case for admitting this further evidence. Order XXXVIII., rules 25–28, supply an analogy for regulating the practice of affidavit evidence in Chambers.

[*Backhouse* v. *Alcock* (3) was referred to.]

Swinfen Eady, in reply.

CHITTY, J.:—

The object of the present application is for leave to file further evidence generally on accounts and inquiries going on in Chambers, and also for leave to file three particular affidavits which have been sworn some time ago, but not yet filed, and this notwithstanding that the cross-examination of the Plaintiff on his account has been completed.

The order for an account was made in March, 1889, the account was brought in in June, and the Chief Clerk directed a supplemental account, which was brought in in October: these accounts were verified by affidavit, and the last affidavit by the accounting party was filed on the 24th of October. On the 30th of November, five weeks after the Plaintiff's evidence was in, application was made by the Defendants for leave to cross-examine the Plaintiff

(1) Law Rep. 16 Eq. 102. (2) 36 W. R. 806.
(3) 28 Ch. D. 669, 672.

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on his accounts. When this order was applied for, the Defendants were warned that they could only obtain what they asked for on the footing of the evidence being closed; the Defendants nevertheless pressed for the order and obtained it. The cross-examination under this order began on the 18th of February last, and ended on the 22nd.

I state these dates to shew the lapse of time that has taken place in this case, and to shew the delay that might be occasioned by adopting what I hold to be an erroneous view of the practice in Chambers: no one, not conversant with proceedings in Chambers, can know of the practices and attempts to delay proceedings which some parties try to adopt, which if successful would in many instances be tantamount to a denial of justice.

After the cross-examination of the Plaintiff was finished, the Defendants proposed to adduce before the Chief Clerk three fresh affidavits which had been sworn before the cross-examination began, but had not been filed—therefore the course adopted by the Defendants was adopted deliberately; and the Chief Clerk refused to allow them to be used, and refused in accordance with what has long been the settled practice in my Chambers.

There is no doubt that I have a discretion to allow these three affidavits to be used, or to allow further evidence to be adduced at any time, on special grounds; the only question is, whether I ought to exercise this discretion in the present instance in favour of the Defendants. Mr. *Swinfen Eady* says that he has, under the rules, and in accordance with the practice, a right to use these affidavits; if his contention is correct, the practice in my Chambers has long been erroneous. I turn to the rules, and I find Order XXXVII., rule 21, provides that evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial; and then rule 22 provides that the practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage. In regard to cross-examination on affidavit evidence, the general practice is not to allow the order to go until the evidence is complete, and rule 21 directs that evidence taken subsequently to

the trial shall be taken in the same manner as evidence taken at or with a view to a trial; evidence at the trial is generally now taken orally, when there is examination and cross-examination of witnesses in open Court, but then there are usually pleadings, and the issues are well defined; so that it is impossible to apply the analogy of a trial in open Court on *vivâ voce* evidence to proceedings in Chambers where the evidence is by affidavit. The most material part of rule 21 is the direction that the evidence is to be taken in the same manner as evidence is taken "at or with a view to a trial." Now the evidence in Chambers is usually taken by affidavit, though in some cases there is *vivâ voce* evidence; so that rule 21 is, if I may say so, well framed, as it would embrace the case of evidence in Chambers being taken by affidavit as well as cases of *vivâ voce* evidence. The analogy required is, I think, supplied by Order XXXVIII., rules 25 to 28, which relate to trial on affidavit. These rules limit a time for filing affidavit evidence, and rule 26 gives a defendant fourteen days after delivery of the plaintiff's list of affidavits, but it does not lay down a hard-and-fast rule, because the parties may agree upon a time, or the Judge may grant them an extended time; still, in the absence of agreement or special directions, fourteen days is the time fixed, and applying the analogy to the case before me, the Defendants had fourteen days from the 24th of October, when the Plaintiff's last affidavit was filed, within which to bring their evidence. Then by rule 27 there would have been seven days allowed for reply, when the evidence would be closed. Then rule 28 provides for cross-examination of the deponent, upon notice to be served within fourteen days after the affidavits in reply, or such extended time as the Judge may appoint. These rules, I think, supply the analogy required for the present case. Where an account is being taken in Chambers it is not the practice to limit any time within which the party opposing the account must file his evidence, though it may be done; there is often no evidence to file in opposition to the account. Still rule 26 does in my opinion apply by analogy to the affidavit of an accounting party in Chambers, and in strictness a party desirous of filing evidence in opposition to the account is bound, at his peril, to bring in his evidence within fourteen days, though of

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course this time may be extended by agreement, or he may apply to the Judge for further time.

That is my opinion on the interpretation of these rules, and I think it right in this case to adhere strictly to this interpretation, for the reasons I have already given. The attempts made in Chambers to create delay are quite surprising, and I consider it therefore of great importance to prevent delay as far as possible.

I now come, in the exercise of my discretion, to consider whether I ought to allow any further time to these Defendants, and I think I ought not. The accounts do not appear to be heavy, and the delay is remarkable, because the accounting party had brought in his accounts and his evidence in support of them by the 24th of October, five months before the application for leave to adduce further evidence is made; and I cannot help thinking that the object of the Defendants in this case is to create delay. If I acceded to the Defendants' argument, affidavit after affidavit might be filed, cross-examination after cross-examination might take place without limit; then the fresh affidavits would want answering by other affidavits in reply; there would be more cross-examination, and there would be no end to the matter. I mention this just to shew the extravagance of the argument that has been adduced. Admitting, then, that I have a discretion, I refuse to exercise it in favour of the Defendants, and I intend to adhere to the practice, now settled in my Chambers, that the evidence is to be considered closed when the cross-examination begins. I therefore refuse this application, with costs to be the Plaintiff's in any event.

I may add that if there should be any particular point on which the Defendants wish to file further evidence, I will consider it, and probably in my discretion I shall allow it to be filed, if a proper case is made out; at present no particular or definite reason has been given to shew why the Defendants wish to adduce further evidence.

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The Defendants appealed. The appeal was heard on the 23rd of April, 1890.

Swinfen Eady, for the appeal:—

I contend that there is no such rule of practice as is laid down by Mr. Justice *Chitty*, that no evidence can be filed after the cross-examination of the accounting party. Such a rule would work hardship and injustice. A party who is contesting accounts cannot know what necessity there is for adducing evidence until he knows how far the accounting party can vouch his accounts, and the cross-examination of the accounting party may be necessary to give him that information. On a motion there is no limitation of the time for adducing evidence. In the case of evidence on a summons there is no rule limiting the time for filing evidence. We admit that the Judge might in his discretion have limited the time, but that he has not done: *In re Chifferiel* (1). Mr. Justice *Chitty* refers to Order XXXVII., rule 21, which says that evidence taken subsequently to a trial shall be taken as nearly as may be in the same manner "as evidence taken at or with a view to a trial." You cannot leave out "at or." Now, at a trial the Plaintiff's witnesses are examined and cross-examined before the Defendant adduces evidence at all. That is against the rule laid down by Mr. Justice *Chitty*. But suppose "taken with a view to a trial" stood alone. The analogy cannot be applied, for no period is given from which the time is to be reckoned. The analogy to proceedings at a trial must be carried out fairly, as indicated by Lord *Herschell* in *Concha* v. *Concha* (2). In the case of a trial by affidavit, Order XXXVIII., rules 25, 26, 27, fixes dates; but in Chambers there is no time from which the fourteen days mentioned in rule 25 can be counted. It cannot be contended that the Plaintiff is to have time at his discretion, and that the Defendants are to be limited to fourteen days. Cross-examination on the affidavit of an accounting party is a matter of right: *In re Lord's Estate* (3); and in granting it, it cannot be right to impose on the Defendants the term that they shall not adduce further evidence. The time for filing evidence might have been limited, but this was not done. If we are too late, it is owing to our misunderstanding the practice, the rule on which Mr. Justice *Chitty*

(1) 36 W. R. 896. (2) 11 App. Cas. 541, 558, 559.
(3) Law Rep. 2 Eq. 605.

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has acted being one not to be found in any general order, decision, or book of practice; so if we are wrong, some time for evidence ought to be allowed us. At all events, we should be allowed to file the affidavits which we obtained before the cross-examination had taken place, as they cannot have been framed with reference to anything disclosed by the cross-examination.

Romer, Q.C., and *MacSwinney*, for the Plaintiff, were not called upon.

LINDLEY, L.J.:—

I may say at the outset that our decision is without prejudice to any application which the Defendants may make to Mr. Justice *Chitty* for leave to file evidence on any special grounds. Mr. *Swinfen Eady* did not allege before us any special ground, but contended that Mr. Justice *Chitty's* decision was not warranted by the General Orders, and was contrary to the practice of the Court. There appears to be no rule in the General Orders that directly settles the point. Mr. Justice *North*, in *In re Chifferiel* (1), held that the Judge in Chambers had authority to fix a time within which affidavits must be filed on any application. In this I think he was right; but there is no rule directly applicable to a case of the present description. It has, however, been found convenient to deal with it in Chambers by saying to a party, "If you wish to cross-examine you may do so, but under ordinary circumstances you must bring in your own evidence first, and cross-examine afterwards." This has been found in practice to work well, and is understood in the Judges' Chambers; and it is well known to practitioners there that an order to cross-examine cannot be got except on that understanding. Hence arose the warning given to the Defendants' solicitor, that if he took an order for cross-examination he could not afterwards adduce evidence. We are asked to condemn this practice. I should condemn it if the rule were laid down as a hard-and-fast rule, but that is not so; it is only laid down as a convenient general rule. Here no special ground is alleged for allowing the Defendants to file evidence, and the Judge, looking at the

(1) 36 W. R. 806.

time which had elapsed and the other circumstances of the case, thought the Defendants had had time enough, and in his discretion refused to give them more. I see no reason to differ from his conclusion, and the appeal will be dismissed.

BOWEN, L.J.:—

I am much struck by this, that the Defendants are asking us to set them entirely at large as to adducing evidence. The Judge has a discretion to fix the times for proceedings in Chambers, and it must be a matter within his discretion at what time a cross-examination shall take place. It may be a convenient practice, that in the general course of business, and apart from special circumstances, there shall be no cross-examination till the evidence has been closed. It is not a rule that binds this Court; but it is a course of procedure which the particular Judge in ordinary cases approves and acts upon. To make it a fixed rule which can never be departed from would in many cases work great injustice, and it may in the present case be necessary for the purposes of justice that the Defendants should have leave to adduce evidence, but this has not been shewn. The Court of Appeal has always held that it is competent to the Judges of First Instance to indicate to those who practise before them on what lines they will in ordinary cases exercise their discretionary powers; and in that limited sense only can it be said that this is a rule of practice in Chambers. This course of procedure in Chambers being understood, as I have no doubt it was, by both the solicitors who went before the Chief Clerk, the attention of one of them was called to it by the other just at the right time. All parties must have understood the usual course of practice, and the Defendants cannot claim, as of right, to adduce fresh evidence after taking an order for cross-examination on the understanding that the usual course of procedure would be followed.

Solicitors: *Minshall, Parry-Jones, Woosnam, & Smith*, agents for *Woosnam, Newtown; Talbot & Quayle*, agents for *Talbot & Watkins, Newtown.*

H. C. J.

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March 5, 12.

In re BAKER.
NICHOLS *v.* BAKER.

[1889 B. 5520.]

Administration of Insolvent Estate—Transfer from Chancery Division to Court of Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-s.* 4.

The power given by the *Bankruptcy Act*, 1883, s. 125, sub-s. 4, to transfer the administration of an insolvent estate from the Chancery Division to the Court of Bankruptcy, is a discretionary power, and not a power which the Judge is bound to exercise whenever the estate is shewn to be insolvent.

The circumstance that the executor has a right of retainer and a liberty not to plead the *Statute of Limitations* to a debt, which rights would be recognized in the Chancery Division, but might be taken away by a transfer to the Court of Bankruptcy, is not a ground for the transfer.

Decision of *Chitty*, J., affirmed.

JOHN LAKE BAKER died on the 26th of October, 1889, leaving a will of which the Defendants were the executors. Probate was granted to the Defendants on the 14th of December. On the same day *Nichols*, a creditor of the testator, took out an originating summons for the administration of the estate, stating his debt as being £3902 15*s.* 3*d.* The assets appeared to be about £4000. On the 8th of January, 1890, the *Stamford, Spalding, and Boston Banking Company*, who claimed to be creditors of the testator for £2473 2*s.* 1*d.*, took out a summons under the *Bankruptcy Act*, 1883, s. 125, to have the proceedings in the action transferred to the County Court having bankruptcy jurisdiction to administer the estate. On the 27th of January, Mr. Justice *Chitty* in Chambers made the usual order for the administration of the testator's personal estate. On the 3rd of February the application by the company that the proceedings might be transferred to the County Court was refused in Chambers by Mr. Justice *Chitty*. On the 14th of February the company moved to discharge the order of the 3rd of February.

That the estate was deeply insolvent was not disputed. It was alleged by the bank that part of the debt claimed by the Plain-

tiff was open to dispute on the ground that it was barred by the *Statute of Limitations*, but that the executors who were friendly would not set up the statute. It appeared also that one of the executors claimed to be a creditor of the testator's estate to a considerable amount, which she claimed to retain out of the estate.

Edward Ford, in support of the motion:—

The Court has jurisdiction to make the order for transfer: *In re Weaver* (1); *Senhouse* v. *Mawson* (2); *In re York* (3), and acting on that discretion will transfer this case to the County Court, and the proceedings which have already been taken will be adopted by the Court of Bankruptcy. If the transfer is made the bank will be in a better position, as when the Plaintiff comes to prove his debt in the Bankruptcy Court the bank will be able to set up the *Statute of Limitations*, which in this Court they cannot do: *Fuller* v. *Redman* (4); *Adams* v. *Waller* (5). Moreover, if the transfer is made, the executrix would under sect. 125, sub-sect. 7 of the *Bankruptcy Act*, 1883, be deprived of the right of retainer.

[He also referred to *In re Williams* (6).]

P. S. Gregory, for the Plaintiff:—

There are no special circumstances in this case for directing a transfer, and the Court in exercising its discretion will take into consideration the questions of convenience, delay, and expense, and on none of those grounds is it desirable that the transfer should be made.

The questions of the setting up the statute and the executrix's right of retainer are not good grounds for directing the transfer. Those questions ought not to influence the Court either way.

Warrington, for the Defendants, referred to *Whitaker* v. *Wright* (7), and *Cardell* v. *Hawke* (8).

(1) 29 Ch. D. 236.
(2) W. N. 1885, p. 119; 52 L. T. (N.S.) 745.
(3) 36 Ch. D. 233.
(4) 26 Beav. 614.
(5) 14 W. R. 789.
(6) 36 Ch. D. 573.
(7) 2 Hare, 310.
(8) Law Rep. 6 Eq. 464.

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CHITTY, J.:—

It is not disputed that the terms of the 4th sub-section of the 125th section of the *Bankruptcy Act*, 1883, are such as to give the Court a discretionary power to order a transfer of the proceedings from this Court to the Bankruptcy Court.

Mr. Justice *Stirling*, in *In re York* (1) had the point before him, and he so decided, and in that case he referred to a decision of Mr. Justice *Pearson* in *In re Weaver* (2) to the same effect. Mr. Justice *Stirling* said (3): "In the exercise of that discretion, supposing there are no special circumstances, and that the application is made just after the proceedings have been commenced, the predominating considerations must, I conceive, be those of convenience, delay, and expense." It is stated that the assets, roundly speaking, are about £4000. There are three executors (Defendants), and having regard to the residence of the parties, I think it is more convenient that the case should be disposed of in *London* than in *Northampton*. Then in regard to delay, this appears to me to be a very simple matter, and the procedure in the Chancery Division of the High Court in cases of this kind, where the parties work willingly together, is at the present moment certainly not open to the objection of delay. Those who in Chambers have to deal with these matters have great experience in all questions of this sort, and there is no reason to apprehend that there would be any delay—in fact, in a case of this kind an administration may take place, and an estate be wound up with promptitude.

Then in regard to expense, possibly there is a balance in favour of the Bankruptcy Court; but I have not sufficient experience of the proceedings of that Court to be able to express a decided opinion on the point. There ought not to be in a case of this kind any expense out of proportion to whatever little difficulty there may be in getting in the assets. It must be remembered that getting in the assets in a matter of this kind generally forms the most difficult part in an administration. In regard to that there is an affidavit, and there is nothing to contradict the affidavit or to shew that the affidavit is not

(1) 36 Ch. D. 233. (2) 29 Ch. D. 236.
(3) 36 Ch. D. 238.

made in fair terms. But there is an affidavit, to the effect that if the administration be left in the executors' hands, subject of course to the control of the Court, they will be able to make some better terms with the landlords with regard to leaseholds, better terms than officials would in representing the estate for that purpose in the Bankruptcy Court; so that, taking the three heads mentioned by Mr. Justice *Stirling*, I think what he has stated affords me a good and sensible guide. Taking those three heads, I can find no ground for making the transfer, but I can find ground against it.

But the real grounds upon which the transfer is asked are two. It is said that the bank, who are the moving parties, will be in a better position in the Court of Bankruptcy, and that the executors, or, more particularly, one of them (the widow), will be in a worse position, because it is said that the two Courts will not administer the deceased's estate according to the same rules of law and equity. The two points are these: the Plaintiff has proved on his debt some £800 for the purpose of obtaining the order which in the old days would have been called a decretal order, and it is said for the bank that although it cannot be disputed that some part of this debt is not barred by the statute that a portion of it possibly may be. Mr. *Ford* was very temperate in his observations, and he did not put it higher than that. He thinks, therefore, that according to the course of administration under this very same judgment order, whether it takes place here or whether it takes place in the Bankruptcy Court, he may have a chance if he can of raising the *Statute of Limitations*. At the same time he quotes authority (I am not going into this question with any minuteness) to shew that here he would not be at liberty to set up the *Statute of Limitations* when the Plaintiff comes in to prove the debt in the usual way under the order as against the general body of creditors, and he thinks he may have a chance of setting up the statute under the bankruptcy jurisdiction. Then he also pointed to certain of the sub-sections of the 125th section, and says that if he can get the transfer he should be able to deprive the executrix of her right of retainer. On the other hand, the Plaintiff says: "Whatever rights I have got I wish to retain. If it is my position under this order that as against my debt or any

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part of my debt, the *Statute of Limitations* cannot be set up, I have got the right I wish to have, and I do not wish to give it up;" and the executrix says: "If I have a right of retainer, why should I be deprived of it?" It is, perhaps, unfortunate that the Legislature, in providing for these transfers, has not foreseen the possible difference in the administration. I only say "possible difference" because I am not called on to decide whether Mr. *Ford* is right. He may be wrong, because if I make a transfer now, according to Mr. Justice *Stirling*'s judgment, after having consulted with the Judge who administers the Bankruptcy portion of this jurisdiction, the order will go, and the proceedings will go on exactly in the state in which they now are; I am not satisfied at the present moment (but it is not worth while delaying my judgment to make further inquiry) whether the Bankruptcy Court would make a new order for administration. I see reasons why it should not, because there is this order as it stands, and there is no vesting in the officer of the Bankruptcy Court, unless such an order as is referred to in the 5th sub-section shall be made, and the order in the 5th sub-section is not an order of this Court, but an order under the new jurisdiction conferred by the 125th section.

Now, I say these are the real grounds on which the order for transfer is asked, but I have Mr. Justice *Stirling*'s judgment.

He says that the right of retainer ought not to form a ground for refusing to make a transfer. I cannot understand that it is any part of my duty but to sit here and administer justice impartially, and I do not think I ought to make a transfer depriving the executrix of her right of retainer. I found myself on the reasoning of Mr. Justice *Stirling* in the case that has been cited and then by parity of reasoning this question of right, if there be a right, or the absence of the right, if that be the proper view, of setting up the *Statute of Limitations*, stands in exactly the same position, and should not form a ground either for or against a transfer.

The result is, therefore, that in exercising my discretion upon the principle that I stated in the commencement of this judgment, I think I ought not to make any order of transfer.

I would only throw out that there might be ground for the

Legislature considering this question in some detail, because it does appear a strange anomaly that there should be two modes of administering an estate of this kind.

G. M.

The bank appealed from this decision. The appeal came on for hearing on the 5th of March, 1890.

Everitt, Q.C., and *E. Ford*, for the appeal:—

We wish the estate to be administered as in bankruptcy. The *Statute of Limitations* cannot in Chancery be set up against the Plaintiff's debt: *Fuller* v. *Redman* (1); and the executor will have a right of retainer. We ask, therefore, for a transfer to the bankruptcy jurisdiction under the *Bankrupcy Act*, 1883 (46 & 47 Vict. c. 52), s. 125, sub-s. 4. We contend that on the true construction of that section the Judge has no discretion, but that the order is of right unless he considers that there is a probability of the estate proving solvent.

[COTTON, L.J.:—It was held that the order was of right, not because "may" meant "must," but because a winding-up order was practically the creditor's only remedy, and it was, therefore, the duty of the Court to give it to him.

LOPES, L.J., referred to *In re Weaver*, (2), as shewing that the Court had a discretion.]

That case is against us, but it is only before a Court of First Instance, and we ask this Court to overrule it. The rule laid down by Lord Justice *Bowen*, in *Knowles* v. *Roberts* (3), is, we submit, the correct one: "It becomes the duty of the Judge who has to apply the rule, to apply his power in a fit case; and a fit case will be that which fulfils the definition of the rule, and in which there are no other circumstances which make it inappropriate, and inconvenient, or unjust to apply the power." The insolvency of the estate is the thing to be tried, and is the test whether the order is to be made. *Bowes* v. *Hope Life Insurance Company* (4) shews that under 25 & 26 Vict. c. 89, s. 199, the granting a winding-up order to a creditor is not a matter of discretion.

(1) 26 Beav. 614.
(2) 29 Ch. D. 236.
(3) 38 Ch. D. 263, 271.
(4) 11 H. L. C. 389.

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The authorities are summed up in *Julius* v. *Bishop of Oxford* (1). In the case of Alderman *Backwell* (2), it was held that "may" in a Bankruptcy Act meant "must," and the word was similarly construed in *Macdougall* v. *Paterson* (3), so that where power is given to do a judicial act the Court is bound to do it when the circumstances arise. The observations of Mr. Justice *Coleridge* in *Reg.* v. *Tithe Commissioners* (4) are to the same effect. In the *Church Discipline Act* (3 & 4 Vict. c. 86, s. 1), under which the case of *Julius* v. *Bishop of Oxford* arose, the discretionary words were much stronger than here, and yet the Court thought it necessary to examine the whole Act to see whether they were not intended to be compulsory.

[COTTON, L.J.:—It is an inaccuracy of language to say that "may" can mean "must" or "shall." It simply confers a power. We must look at the object of the statute to see whether a duty to exercise the power is imposed.]

The object of this Act was to produce a rateable distribution of insolvent estates. This section was considered in *In re Williams* (5), and the opinion is expressed that it secures to the creditors an administration in bankruptcy of an insolvent estate.

Whitehorne, Q.C., and *Warrington*, for the executors:—

This question is very clearly dealt with by Lord *Selborne* in *Julius* v. *Bishop of Oxford* (6). His Lordship says that such words as "it shall be lawful" have the same meaning whether there is or is not a duty or obligation to use the powers which they confer; and that they are potential, and never in themselves significant of any obligation, but that "the question whether a Judge or a public officer to whom a power is given by such words is bound to use it upon any particular occasion or in any particular manner must be solved *aliunde*, and in general it is to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power." Now, *In re Gould* (7) shews that a

(1) 5 App. Cas. 214.
(2) 1 Vern. 152.
(3) 11 C. B. 755.
(4) 14 Q. B. 459, 474.
(5) 36 Ch. D. 573, 583.
(6) 5 App. Cas. 214, 235.
(7) 19 Q. B. D. 92, 96.

deceased insolvent is not in the position of a bankrupt. If the Legislature had intended that the estate of a deceased insolvent should, as a matter of course, be administered in bankruptcy, it would have said so. The language of this sub-section is discretionary from beginning to end, whereas in sub-sects. 3, 5, and 7 we have the word "shall," which shews that where the Legislature intended compulsion it used the proper expression. In sub-sect. 4 no limit of time is imposed, which is in favour of discretion. If the enactment were compulsory great injustice might be done; an administration might be transferred to bankruptcy after the estate had been nearly wound up in Chancery. The Courts of first instance have taken the view for which we contend: *In re Weaver* (1); *In re York* (2). Sub-sect. 5 must be limited strictly to property which forms part of the estate at the time when the vesting takes place; and if an executor has retained a debt, that amount is gone from the estate, and sub-sect. 5 cannot apply to it.

Byrne, Q.C., and *P. S. Gregory*, for the Plaintiff:—

The direction as to insolvency is urged to be a limit placed on the discretion of the Judge; but it is in fact a condition precedent to the discretion arising.

Everitt, in reply, referred to *In re Gould* (3).

COTTON, L.J.:—

This is an appeal from Mr. Justice *Chitty*, who refused to make an order transferring the administration of the testator's estate from the Chancery Division to the Court of Bankruptcy. It is contended by the Appellant, first of all, that under the Act it is imperative on the Judge to make this order, insolvency having been established. The words are that the Court may in such a case make an order for transfer, and, in my opinion, those words can never do more than give power to the Judge to make the order that is asked for, and cannot make it imperative on him. But there is another question, which is the real question to be

(1) 29 Ch. D. 236. (2) 36 Ch. D. 233, 238, 239.
(3) 19 Q. B. D. 92, 100.

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decided in all these cases, viz., although those words only give power to the Judge to make an order which he could not have made unless the Act had authorized him to do so, is there anything in this or any other part of the Act requiring him to exercise that power? In *Julius* v. *Bishop of Oxford* (1) Lord *Selborne* states correctly and shortly the question which has to be considered in cases of this kind.

I think that great misconception is caused by saying that in some cases "may" means "must." It never can mean "must," so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word "may," it becomes his duty to exercise it. Nothing is said in the present Act as to the duty of the Judge to exercise the power given him by sect. 125, sub-sect. 4; but it is said that the whole object of the Act of Parliament was to secure equality amongst the creditors, and that, therefore, as leaving the administration in the Chancery Division leaves the executor at liberty not to plead the *Statute of Limitations*, and leaves the executor's right of retainer unaffected, it is the duty of the Judge to make the order asked for, because it is the object of the section to secure the rateable distribution which is provided for by the law of bankruptcy.

Let us consider that. In my opinion, if Parliament had meant to do away with an executor's right of retainer it would have said so. It is quite a mistake to suppose that the right of retainer is an equitable right. It is a common law right to which a Court of Equity gives effect in administering the estates of deceased persons by allowing an executor to retain his debt out of legal assets. But he cannot do so as regards equitable assets, which shews that the Court of Chancery recognised fully the equitable right of creditors to equal payment. Then as regards the executor not pleading the statute, the Court of Chancery does not hold an executor liable for not pleading the statute, but leaves him at liberty to plead it or not. There may be circumstances that render it morally wrong to plead the statute, and a defence under the statute is never looked upon with any great favour.

Then it is said that the language of this statute shews that

(1) 5 App. Cas. 214, 235.

it is intended not directly but indirectly to do away with these powers of the executor, by saying that the receiver in bankruptcy is to have regard to any claim by the legal personal representative to payment of funeral and testamentary expenses incurred by him, and that they are to be payable in full. That is one case which is provided for; but there are other cases which possibly were never thought of by Parliament. In my opinion, the mere existence of a right recognised by the Chancery Division which has not been recognised in the Court of Bankruptcy, and which the executor would lose if there was a transfer, is not a ground for exercising the discretion given by sub-sect. 4.

It may be (I do not express an opinion on it) that Mr. Justice *Stirling* was right in saying in *In re York* (1) that the fact of the existence of the right of retainer would not be a ground for not exercising the power of transfer. There were in that case circumstances which rendered it desirable that there should be a transfer, and it may have to be decided hereafter whether the transfer of an administration to bankruptcy will prejudice or injure an executor in his right of retainer, and, if so, whether that may be a ground for not exercising the power of transfer; but, in my opinion, you cannot take the existence of a right of retainer, or the fact that the executor has not thought fit to plead against the Plaintiff the *Statute of Limitations*, as a ground for making the transfer, if there is no other reason for holding it desirable. In my opinion, if the Legislature had intended that where an estate is insolvent the executor should have no right to retain, and that he should be bound always to take advantage of the *Statute of Limitations*, it ought to have said so, and I think it would have said so.

In my opinion there is given by the word "may" a power as to the exercise of which there is a discretion, and there is not here enough to shew that it was the duty of the Judge to exercise that power. I may call attention to this, that we have many provisions in the *Bankruptcy Acts* to secure an equal division among creditors, not only of the property which the bankrupt has at the time of the bankruptcy, but of property which he has parted with, as, for instance, property included in voluntary

(1) 36 Ch. D. 253.

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settlements made within a certain time before the bankruptcy, which provisions have been held not to be applicable in the administration of the insolvent estates of deceased persons in bankruptcy. This shews that Parliament did not intend by this section to apply all the provisions of the *Bankruptcy Acts* to the administration of the estate of a deceased insolvent.

In my opinion Mr. Justice *Chitty* was right, and, although I quite hold that this is a discretion the exercise of which may be appealed from, I think that he exercised that discretion rightly in this case.

LINDLEY, L.J.:—

No ground is alleged for transferring this action from the High Court to the Court of Bankruptcy except the broad and very important ground that if the transfer is made the assets will be administered in a different manner. To many minds the mode of administering assets in bankruptcy is preferable to the mode of administering them elsewhere. The administration of assets in bankruptcy is statutory and depends on well-considered enactments, whereas the administration of them in Chancery depends on technical rules, which are not always satisfactory.

The right of an executor to retain is a common law legal right. A man cannot sue himself, and out of that the law developed the right of an executor to retain a debt due to him from the testator. That right has been disapproved of by those who have had the development of equitable jurisdiction, and they declined to follow the law by applying it to equitable assets. Still, it is perfectly well known to every lawyer that Parliament has never faced the difficulty of abolishing it. The 10th section of the *Judicature Act*, 1875, is so worded as not to prejudice it, see *Lee* v. *Nuttall* (1), though, perhaps, the Legislature may have intended to do so. So here Parliament has said nothing to the effect that the right to retain shall be abolished. There are certain other distinctions between administration in Chancery and in bankruptcy. Now is it right that, in consequence of these distinctions, whenever there is an insolvent estate being administered in Chancery it should be transferred to the Bankruptcy

(1) 12 Ch. D. 61.

Court? If that was what Parliament meant it would have used very different language, and would not have said "may" so often and contrasted it with "shall." As a matter of construction I am convinced, having regard to the principle laid down in *Julius* v. *Bishop of Oxford* (1), that this is a discretionary power, and I cannot say that Mr. Justice *Chitty* has exercised his discretion wrongly. There is a question of some difficulty as to what the effect of the transfer would be, and whether the administration would not have to proceed on the footing on which it had been commenced, and this is a reason against the transfer. I am not prepared to differ from Mr. Justice *Chitty*.

LOPES, L.J.:—

Sub-sect. 4 of sect. 125 of the *Bankruptcy Act*, 1883, authorizes, in the case provided for by that sub-section, a transfer from the High Court to the Court exercising jurisdiction in bankruptcy—that is, in the present case, the County Court, and the first question which is raised is this, whether that power of transfer is discretionary or imperative? It is contended by Mr. *Everitt* that there is no discretion in the Judge, but that he is bound to transfer.

Now the word used in sub-sect 4 is "may," and the word "may" is beyond all question potential, it implies a power; but, if it is coupled with a duty on the Court or the person to whom it is given to use that power in a certain particular way, it then no doubt becomes imperative. In the present case I can see no such duty, and, in my opinion, therefore, the power conferred by this sub-section is discretionary.

But, then, it is said that even if there is a discretion in the Judge he has in this particular case wrongly exercised that discretion. The ground upon which it is said he has wrongly exercised his discretion is that the effect of his exercising it in the way he has done is to preserve to the legal personal representatives and the Plaintiff-creditor advantages which they possess if the administration takes place in the Court of Chancery. These rights of a legal personal representative and Plaintiff creditor are rights which they possess, and I cannot say that the

(1) 5 App. Cas. 214.

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recognition of these rights is any ground for holding the discretion to be wrongly exercised. It is, perhaps, an anomaly that the distribution of assets should proceed in a different way, depending very much on whether the proceedings are taken first in the Court of Chancery or in the Court of Bankruptcy; but that is the fault of Parliament, and is a matter with which we have nothing to do.

I think, therefore, this appeal should be dismissed with costs.

Solicitors for Appellants: *Penley & Grubbe.*
Solicitors for Plaintiff: *Kinsey, Ade, & Hocking.*
Solicitor for Defendants: *Thornton Toogood.*

H. C. J.

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KEKEWICH, J.
Jan. 18, 20.
C. A.
March 14, 15, 18, 19.

AMERICAN BRAIDED WIRE COMPANY *v.* THOMSON.

[1886 A. 1136.]

Patent—Infringement—Measure of Damages—Remoteness—Loss by Reduction in Price by Patentees.

In an action by patentees for infringement, the Plaintiffs obtained judgment, and an inquiry as to damages was referred to an Official Referee. The referee found by this report that the prices at which the Defendants at first sold the patented articles were lower than the Plaintiffs' original prices, and that they lowered them again from time to time during the period of infringement, and that the Plaintiffs reduced their prices to the prices of the Defendants from time to time to meet the competition of the Defendants, but never reduced them below the prices of the Defendants for the time being. He also found that, but for the illegal competition of the Defendants the Plaintiffs would have made all the sales made by the Defendants, as well as those made by themselves, at their original prices, subject to a per-centage for increased sales caused by the connection and exertions of the Defendants, and by the reduction of the prices. The Court held that the evidence justified the findings of the Official Referee:—

Held (reversing the decision of *Kekewich*, J.), that the Plaintiffs were entitled to recover all the profits which would have been made by them if all the sales made by them and by the Defendants had been made by the Plaintiffs at their original prices; after making an allowance for the increased sales attributable to the connection and exertions of the Defendants and to the reduction in the prices.

United Horse Shoe and Nail Company v. *Stewart* (1) considered and distinguished.

IN the year 1885 *W. R. Blake* obtained a patent for improvements in bustles and dress improvers for ladies' dresses. The

(1) 13 App. Cas. 401.

American Braided Wire Company became owners of the patent, and in 1886 commenced the present action against Messrs. *W. S. Thomson & Co.* for infringement of the patent, claiming an injunction and damages.

Mr. Justice *Kekewich*, at the trial of the action, held that the Plaintiffs' patent was invalid; but his judgment was reversed by the Court of Appeal, who directed an inquiry as to what damages had been sustained by the Plaintiffs by reason of the infringement of the patent by the Defendants, and this decision was affirmed by the House of Lords.

The inquiry as to damages was by consent referred to an Official Referee.

Witnesses on both sides were heard before the Official Referee; and by his report, dated the 17th of December, 1887, he found as follows:—

1. The Plaintiffs commenced selling their bustles about the 3rd of June, 1886, and the Defendants commenced selling one kind of bustle about the 1st of May, 1886, and others about the 1st of August, 1886. The Defendants' original prices were lower than those of the Plaintiffs, and on the 1st of January, 1887, the Plaintiffs reduced their prices to those of the Defendants. The Defendants thereupon, on the 6th of January, 1887, reduced their prices, and the Plaintiffs on the 12th of January again reduced their prices to those of the Defendants; the Defendants on the 10th of February, 1887, again reduced their prices, and the Plaintiffs on the 21st of February, 1887, again reduced their prices to those of the Defendants. The Plaintiffs never reduced their prices below those of the Defendants. The Plaintiffs' reductions of prices were made in consequence of the Defendants' competition, and their selling at lower prices than those of the Plaintiffs, and in order to prevent the Plaintiffs being driven out of the market by the Defendants, and but for the Defendants' competition and their selling at lower prices, the Plaintiffs would, subject to the allowances mentioned in paragraphs 2, 3, and 4, have made the sales made by the Plaintiffs and also those made by the Defendants at the Plaintiffs' original prices.

2. The profits which the Plaintiffs would have made on bustles

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made and sold by the Plaintiffs between June, 1886, and the 2nd of February, 1888, had they sold the same at the Plaintiffs' original prices, would have been £7257 14*s.* more than the actual profits realized on such bustles; and after allowing 20 per cent., or £1451 10*s.* 8*d.*, as a reasonable deduction for the profits on increased sales caused by the reduction of prices, the sum of £5806 3*s.* 4*d.* is the loss of profits caused to the Plaintiffs on their own sales by the reductions of prices.

3. The profits which the Plaintiffs would have made on bustles made and sold by the Defendants, between June, 1886, and the 2nd of February, 1888, had the Plaintiffs made the same and sold them at the Plaintiffs' original prices, would have been £4028 6*s.* 3*d.*; and after allowing 10 per cent., or £402 16*s.* 7*d.*, as a reasonable reduction for the profits on sales due to the connection and exertions of the Defendants, and 20 per cent., or £805 13*s.* 2*d.*, as a reasonable deduction for the profits on increased sales caused by the reduction of prices, the sum of £2819 16*s.* 6*d.* is the profit which the Plaintiffs would have made on bustles made and sold by the Defendants during the said period, had the prices not been reduced and had the Defendants not interfered so as to prevent the Plaintiffs making such sales.

4. The profits which the Plaintiffs would have made on bustles made and sold by the Defendants, between June, 1886, and the 2nd of February, 1888, had the Plaintiffs made the same and sold them at the prices which they were getting for bustles made by themselves, was £1838 15*s.* 7*d.*; and after allowing 10 per cent., or £183 17*s.* 6*d.*, as a reasonable deduction for the profits on sales due to the connection and exertions of the Defendants, the sum of £1654 18*s.* 1*d.* is the profit which the Plaintiffs would have so made.

5. I find the damages sustained by the Plaintiffs by reason of the infringement by the Defendants of the Plaintiffs' patent amount to the sum of £8625 19*s.* 10*d.*

The Plaintiffs moved the adoption of this report. The Defendants moved to vary the report on the ground that the findings of the Official Referee were against the evidence, and that the damages were excessive.

Aston, Q.C., *Cohen*, Q.C., and *W. N. Lawson*, for the Defendants, contended that the report was wrong in finding (1) that the reduction in prices made by the Plaintiffs was in consequence of the Defendants' competition; (2) that the Plaintiffs could have made the sales which were effected by the Defendants, and at their original prices. They cited *United Horse Shoe and Nail Company* v *Stewart* (1), *Penn* v. *Jack* (2), *Smith* v. *London and North-Western Railway Company* (3).

Sir *R Webster*, A.G., *Moulton*, Q.C., and *R W Wallace*, for the Plaintiffs, were only called on as to the question whether they were entitled to damages for the reduction in price. They contended that *United Horse Shoe and Nail Company* v. *Stewart* did not bear out the argument of the Defendants, that the reduction in price ought not to be taken into account in calculating the damages

Cohen, in reply.

KEKEWICH, J (after stating and adopting the findings of the Official Referee on the facts, continued) —

The much more serious question, and one which was not necessarily before the referee, though he has assessed the damages on a particular footing, is whether that reduction in prices may be properly regarded as an element in assessing the damages. It is argued that this consequence of competition is not the direct natural result which the law regards in estimating damages, that, to use a technical phrase, the damages arising from such a result are too remote I do not intend to express any opinion of my own on that abstract proposition, because I am bound to follow the decision of the House of Lords in the *United Horse Shoe and Nail Company* v. *Stewart*. That, like this, was a patent action. The rights of the patentees had been decided, an interdict had been granted, and damages had to be assessed. For that purpose there was a new action, and the relief claimed in that new action is stated The second head of relief, specify-

(1) 13 App Cas 401 (2) Law Rep 5 Eq 81
(3) Mac P. C 188, 201

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ing what damages were claimed, is, "by the reduction of their prices which they alleged was necessary, and the direct result of the unlawful acts of the respondents." That was therefore before the Court as one of the issues in the action.

The point was very fully discussed by Lord *Macnaghten*. It seems to me that Lord *Macnaghten* intended to lay down this: that in the case of an action by a patentee against an infringer for damages, although the patentee may be entitled to the benefit of all sales made by the infringer as if they were made by himself, so that he will get all the profit so made by the infringer, yet if he thinks fit to reduce the price he is not entitled to recover the difference in price because it is not the natural and direct consequence of the infringer's acts and is therefore too remote. That seems to me the conclusion at which he arrived. From this view neither of the other learned Lords in the slightest degree dissented, and I think I must take them to have assented to it, because the judgment was given in their presence, and they did not deal with the particular matter. At any rate, it is the considered opinion of one of the Lords of Appeal given in a judgment in the ultimate Court of Appeal, and I think is binding on me.

Therefore I must adopt the alternative which the Official Referee has conveniently presented to me, so as to prevent any necessity of referring it back to him. Of course, if the Plaintiffs are not entitled to any claim in respect of reduction of prices, they get nothing at all as regards those articles which they themselves sold. Then, as regards those articles which the Respondents sold, they get damages in respect of them, but calculated, not with regard to the original prices, but to the prices actually charged. Those have been assessed at the sum of £1654 18*s.* 1*d.* in the 4th paragraph of the Official Referee's report. I think that sum must be substituted for the larger sum which the Official Referee states in paragraph 5, and which is the aggregate of the two sums mentioned in paragraphs 2 and 3.

The case is now before me, as it were, on further consideration, and I have to deal with the costs, I understand, subsequent to the trial. The ultimate sum found due from the Defendants to the Plaintiffs is a large sum, and I do not see that the costs

before the Official Referee would have been materially increased if these wrongdoers had been held liable on the lower rate instead of the higher. I think the Defendants must pay all the costs before the Official Referee, but I think that they have succeeded substantially in varying the report here, and I think they ought to have the costs before me on this occasion, and those costs must be set off. I see that the Plaintiffs' notice of motion asks that those costs may be taxed on the higher scale. Of course, this being a patent case, the costs of the original trial were taxed on the higher scale; but I do not see any reason for applying that rule to a case of inquiry as to damages before the Official Referee, and I think the costs must be taxed in the ordinary way.

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The Plaintiffs appealed from this judgment so far as it refused damages in respect of the reduction of the price of the articles sold by them and by the Defendants; and the Defendants gave notice of a cross-appeal against the judgment on the ground that the findings of fact by the Referee were unsupported by the evidence.

The appeal came on to be heard on the 14th of March, 1890.

Sir *R. Webster*, A.G., *Moulton*, Q.C., and *R. W. Wallace*, for the Appellants:—

The decision appealed from amounts to this, that however much a patentee is obliged to reduce his prices on account of the attempts of an infringer to undersell him, he has no remedy for the loss. The more the infringer reduces the price the greater is the loss of the patentee, but the less his claim for damages. If the patentee does not reduce his prices to those of the infringer he is at once driven out of the market, and perhaps ruined. The loss occasioned by reduction in price is part of the natural consequences of the wrongful act, and the referee finds as a matter of fact that the infringement occasioned this loss. Mr. Justice *Kekewich* treated the *United Horse Shoe and Nail Company* v. *Stewart* (1), as establishing that the loss here was too remote to be allowed in damages; but in that case the Lords really held

(1) 13 App. Cas. 401.

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that it was a good head of damage, but that it was not made out in fact, as the reduction of price was made by the patentee with a view of underselling the infringer and other persons who were competing with the patentee, the article being one which anybody might make.

[LOPES, L.J.:—The reduction of price was your own act; can it then be said to be an immediate result of the infringement?]

Yes, it was our duty to minimize damages. The referee finds as a fact that but for the infringers' competition we should have sold, say, 10,000 bustles at full prices. If we had kept up our prices we should have sold none, and might have claimed as damages the whole of the profits which would have been made by selling 10,000 at full prices. Our reduction in price, therefore, benefits the Defendants by lessening damages. If the decision below is upheld, a patentee will be at the mercy of any great firm which can afford to sell below cost price. *United Horse Shoe and Nail Company* v. *Stewart* (1) was a case of a different nature from this: the patent there was only for a more economical mode of making an article which anybody might make. The judgment below went on the ground that damage was not proved, and in the House of Lords Lord *Macnaghten* is not to be understood as laying down the hard-and-fast rule that a loss from reduction of price can in no case be a head of damage. There are two leading principles as to damages for tort: (1) that the loss for which they are given must be the direct consequence of the wrongful act; and (2), that if the loss can be minimized by the act of the plaintiff he is bound to do it. In the present case the patent is not for producing a known article in a better way, but for producing a new article; so nobody but an infringer can compete with the patentee. Now, suppose the company find out that *Thomson* is putting on the market 1000 dozen bustles: if the contention of the Defendants is right the company could shut up its works and claim damages to the extent of the whole loss, *i.e.*, for the profit which the Plaintiffs would have made on the same number of bustles as the Defendants have sold, subject to any

(1) 13 App. Cas. 401.

deduction that might be made in consideration of the number sold being increased in consequence of the Defendants' reducing their price. That is what the Plaintiff company would have claimed if they had kept up their price, in which case they would have had no sale at all. The company might have elected to claim profits, and if the Defendants had kept the price up, the company would have had the same profits as if they had sold the bustles themselves. The company reduced their price to that of the Defendants that they might not be driven out of the market; if they were not bound to do so and had not done so, the damages would have been much larger. In the *United Horse Shoe and Nail Company* v. *Stewart* (1) there was general competition, and the reductions in prices could not be traced to the wrongful act. In *Sedgwick* on Damages (2) it is said, "The same principle which refused to take into consideration any but the direct consequences of the illegal act, is applied to limit the damages where the plaintiff, by using reasonable precautions, might have reduced them." Suppose the Plaintiffs had refused to reduce their price and had claimed before the referee the profit which would have been made on all their bustles which in consequence of the infringement remained unsold—the Defendants would have turned round and said that it was our duty to sell cheaper so as to lessen the loss: *Yale Lock Manufacturing Company* v. *Sargent* (3) shews that the view for which we contend has been taken by the Supreme Court of the *United States.*

Aston, Q.C., *Cohen*, Q.C., and *W. N. Lawson*, for the Defendants:—

A patentee may stand on his rights as a patentee, but not enter into a trade competition and claim on two grounds. There are not many cases in equity as to damages, but there are a few cases which throw some light on the subject. In *Smith* v. *London and North-Western Railway Company* (4) damages were assessed at what the Court thought a reasonable royalty. We do not refer to that case as analogous, but as shewing the principle

(1) 13 App. Cas. 401.
(2) 7th Ed. vol. ii. p. 164.
(3) 10 Davis Sup. Court, Rep. U. S. 536, 550.
(4) Mac. P. C. 188, 201.

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on which the Court deals with damages—in such cases damages, as the Attorney-General says, must be immediately consequential, but it is to be added that they must be ascertainable with reasonable certainty: *Penn* v. *Jack* (1).

[COTTON, L.J.:—I do not see the applicability of that argument, for the referee has found as a fact that a certain number would have been sold.]

The referee has not gone on the ground laid down by Lord *Hatherley* that the patentee should not have a double remedy, and he has gone against the principle laid down by Lord *Macnaghten* in the case in the House of Lords.

[THE COURT here expressed a doubt whether Lord *Macnaghten* intended his remark to be taken as laying down a fixed rule independently of the circumstances of the particular case.]

If the Court holds that Lord *Macnaghten's* remark does not apply, then we contend that the company's entering into a trade competition was not reasonable. We say also that in an action for tort it lies on the plaintiff to prove damage, and not merely suggest a source of damage, the amount of which cannot be ascertained. It is mere speculation to conclude that the same number of bustles would have been sold if the price had not been lowered. The referee has given no grounds for the conclusion at which he has arrived, and the evidence shews that there are no facts to support his finding. It is, in short, a mere guess. The *onus probandi* is on the Plaintiffs, and that onus they have failed to discharge. In *United Horse Shoe and Nail Company* v. *Stewart* (2) the House of Lords found it to be quite problematical, taking into account the facts that had been proved, what would be the amount of damage resulting from competition in trade. So here, the questions are quite problematical what was the effect of the Plaintiffs having to lower their prices, and what was the amount of damage thereby caused to them. To sustain a claim for damages for alleged loss of profits, the loss must not be of too contingent a character: it must be ascertainable with reasonable certainty. For instance, where a ship has been delayed on her voyage and there is a consequent delay in delivery of cargo, no

(1) Law Rep. 5 Eq. 81. (2) 13 App. Cas. 401.

account can be taken of the profits the shipper has lost by that delay, and therefore no damages can be awarded in respect of it. So where a patent has been infringed, as in the present case, when it is wholly problematical what the loss caused by the infringement is, damages cannot be recovered for that loss. The plaintiff has a definite remedy for the wrongful acts of the defendant, namely, a right to recover the profits actually made, for those profits can be ascertained with certainty; but he cannot go beyond that and recover damages for a loss which must be a mere matter of speculation. Take the case of a covenant by a defendant not to carry on business within twenty miles of the plaintiff's business, and suppose the covenant is broken and the plaintiff seeks to recover damages for the loss he has sustained by his rival selling goods at a price lower than that at which he is himself selling his goods, and by his consequently being compelled to lower his prices, that claim would be too remote. It is only for loss arising from the natural and direct consequence of the Defendants' acts that the Plaintiffs can obtain damages. To recover damages for loss through reduction of price the Plaintiffs must prove distinctly that the loss has been sustained. That they cannot prove, for all the trade witnesses say what is in fact obvious, that lowering of the price would lead to increased sales. It is common knowledge that prices are reduced by a monopolist in order to increase his sales. Even at the reduced prices the Plaintiffs' profits were very large: at the original prices they were enormous—as high as 157 per cent.

Moulton, in reply, in the principal appeal.

Cohen, in reply, in the cross-appeal.

COTTON, L.J.:—

In this case the Plaintiffs succeeded in establishing their patent, and we referred it to the Official Referee to ascertain what damages they were entitled to for the infringement of their patent, they claiming damages, and not an account of profits. The Official Referee made his report and proposed to give a sum of £8,625. Mr. Justice *Kekewich*, though he confirmed the

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report, yet on a point of law held that the Plaintiffs were not entitled to that amount of damages, but were only entitled to £1654 18s. 1d. There is an appeal by the Plaintiffs against that judgment of Mr. Justice *Kekewich*, and there is a cross-appeal by the Defendants, who appeal against the confirmation of the report, being satisfied with the finding of Mr. Justice *Kekewich* as to the mode of assessing the damages they are to pay; but of course they desire to set aside the report, and wish to do so on the ground that it is contrary to evidence—that is, that the findings of fact are not supported by the evidence and that we ought not to confirm them.

Although the Plaintiffs opened their appeal first, and before we quite knew what the point of the Defendants' appeal was, yet I will proceed to consider the appeal of the Defendants first, because in my opinion it is desirable to know the facts before we decide what law is applicable and what the law is. It has been argued very much by Mr. *Cohen*, who pressed upon us every point that he could, that to grant the damages which the Plaintiffs asked for would be to give the damages on mere conjecture, and not, as ought to be done, on the facts proved. I quite agree with him that we ought not to grant damages except on the facts proved, but then he pressed it too far. He wished to make it out, as far as I understood him—though he disclaimed it—that there must be demonstrative evidence of the facts on which the damages are granted; but in my opinion what we have to consider is this: whether the Official Referee to whom the matter was referred, and who has heard the witnesses and considered the matter very carefully, had reasonable evidence to support the findings of fact at which he has arrived.

What I propose to do is to go through the first paragraph of the Official Referee's report in order to see what the facts there stated are, and whether we can, as the Defendants desire us to do, refuse to confirm that and grant another inquiry. I begin with paragraph 1: "The Plaintiffs commenced selling their bustles about the 3rd of June, 1886, and the Defendants commenced selling one kind of bustle about the 1st of May, 1886"—that was just about a month before the Plaintiffs began—"and others about the 1st of August, 1886. The Defendants' original

prices were lower than the Plaintiffs' original prices, and on the 1st of January, 1887, the Plaintiffs reduced their prices to those of the Defendants"—that is important. "The Defendants thereupon, on the 6th of January, 1887, reduced their prices, and the Plaintiffs on the 12th of January again reduced their prices to those of the Defendants. The Defendants, on the 10th of February, 1887, again reduced their prices, and the Plaintiffs, on the 21st of February, 1887, again reduced their prices to those of the Defendants." That was the last reduction, and it will be observed that the Plaintiffs never reduced their prices below those of the Defendants, and that their reduction of prices was always to bring their prices down to the same level as those which the Defendants had adopted. That is not in dispute; but now we come to matters which are in dispute and which I will proceed to deal with. "The Plaintiffs' reductions of prices were made in consequence of the Defendants' competition and their selling at lower prices than those of the Plaintiffs, and in order to prevent the Plaintiffs being driven out of the market by the Defendants." That there was a great deal of discussion about; but in my opinion there was abundant evidence before the Official Referee to justify that finding, and it is the finding to which on the evidence I myself come. I think the evidence shews that in consequence of the action of the Defendants, the Plaintiffs, not to be entirely driven out of the market, did reduce their prices to those which the Defendants had taken as their prices, but never went below nor sought to drive the Defendants in any way out of the market by underselling them. In my opinion, that was a material finding of fact. Then the report proceeds: "And but for the Defendants' competition and their selling at lower prices, the Plaintiffs would, subject to the allowances mentioned in paragraphs 2, 3, and 4, have made the sales made by the Plaintiffs, and also those made by the Defendants, at the Plaintiffs' original prices."

Now that is a most material finding. What are the objections taken to it? It is said there is no allowance made here for the competition caused, not by the Defendants selling their infringements, but by other bustles coming into the market. There certainly seem to have been a good many bustles which were in fashion then, and it is said that has not been taken into

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account in any way by the Referee and therefore his finding ought not to stand.

Yesterday, after the Court rose, we saw the Official Referee in order that we might not misunderstand this report, and by mistake, by not inquiring into the facts, proceed on a wrong footing. What he said was this: That he did fully consider the competition of the other bustles which were not made by the Defendants, but in his opinion, on the evidence before him—and he had fully considered the matter—there was no effect as regards the Plaintiffs and their particular bustles to be attributed to the competition of those other bustles. One of the witnesses of the Plaintiffs, whose evidence was relied on by the Defendants, said: "There is no competition between a frock coat and a tail coat," and these bustles, which were made according to the patent, were bustles of a particular construction. They were said to have this great advantage, that they let in the air, and when compressed, immediately regained their shape, and on that account they were much sought for in the year in which they were introduced, which was a particularly hot year, and therefore the competition of the other bustles had no effect at all and was not in any way to be regarded in this matter. In my opinion, the true result of the evidence was this—and that is the result at which the Official Referee arrived—that the competition such as it was, of those other bustles was not a matter to be regarded in this inquiry as to damages.

Then is the Official Referee right in saying that the Plaintiffs would have sold their own bustles and those which were taken as though they had been sold by them, but which were really sold by the Defendants, the infringers, at their original prices, if it had not been for the competition which he has taken into account—that is to say, the Defendants' competition? Now it appears that when the Defendants from time to time reduced their prices they did so notwithstanding that at the time they were making this reduction, and at the time they were issuing their circulars to say they were going to make the reduction, they had considerable orders for a large numbers of dozens, at the old prices; and from that and from other things the Official Referee came to the conclusion that if there had not been the

competition of these bustles made by the Defendants, the Plaintiffs could have gone on during the short period during which this lasted—not two years—selling at their original prices all the bustles which in fact they did sell, and also the bustles which the Defendants sold in infringement of the Plaintiffs' patent. That is a most material matter. But then the Official Referee has given the Defendants the benefit of twenty per cent. for the increased sale which may have been caused by reducing the price of bustles. Of course it is very probable that if there is a reduction in price there will be a larger sale. That is on the evidence, but one cannot say that he is wrong in allowing only twenty per cent. for that which I think is what he refers to in the 2nd and 3rd paragraphs. In the 2nd paragraph twenty per cent. is what is referred to, but besides that, in the 3rd paragraph there is a ten per cent. allowed for the sales effected by the exertions of the Defendants to their own customers—persons who would not have bought from the Plaintiffs.

I have now gone through the only facts which are really in dispute, and the question remains—What, according to law, on these facts are the damages to which the Plaintiffs are entitled?

I must mention before I go into that point one matter which was argued by Mr. *Aston*. He said that what the Plaintiffs were claiming here was at the same time to get an account of profits and to get damages. But that is entirely wrong. A patentee who succeeds cannot get an account of profits, and also damages, because that is going on a different footing. If he takes profits he adopts that which was done by the infringers and claims himself the profits which have been made by the exercise of the invention. But here profits are only referred to for the purpose of seeing what is the proper measure of damages to which the Plaintiffs are entitled. In my opinion that objection, which was taken by Mr. *Aston*, entirely fails. One must see—and that is the only question here—what is the proper amount of damages to which the Plaintiffs are entitled treating them as claiming damages only. Now I quite agree to this—and I take the judgment of Lord *Macnaghten*, because his judgment has been very much relied upon by Mr. Justice *Kekewich* and also relied

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upon by the Appellants here—that the loss must be "the natural and direct consequence of the respondents' acts." That is the rule to guide us. Here what is found by the Referee is this:—'That but for the wrongful acts of the Defendants the Plaintiffs would have sold at the original prices those bustles which in fact they sold at the lower price and those which the Defendants themselves sold at a lower price; that is to say, they would have made all these sales unless the Defendants had taken some of them instead of the Plaintiffs, and they would have sold all that they did sell at their original prices. That is what he finds to be the loss which the Plaintiffs have sustained, and, in my opinion, the loss on these findings is the direct and natural consequence of the wrongful acts done by the Defendants. If there had been no interference or infringement by the Defendants the Plaintiffs would have been the only persons who would have made these bustles, and then if they could have sold all which in fact they did sell at the lower prices, and all which the Defendants sold at the price which they got, the direct consequence would have been that the acts of the Defendants had caused this loss to them, and that is the loss to which they are entitled as damage.

But then there is another rule which must always be observed when damages are claimed by a person whose rights have been interfered with, namely, that he must do what he can not to increase the loss unnecessarily. Here what the Official Referee has given to the Defendants, in diminution of the claim which the Plaintiffs are entitled to make for the direct consequence of the loss caused by the wrongful acts of the Defendants, is this—he has brought into account the profits which they made by their own connection and exertions, and he has brought into account all the profit on the increased sales which were the consequence of the diminution of price. But can the Defendants say that the Plaintiffs ought to have made more profits; can they say that they ought not to have acted as they did in order to get what profits they could notwithstanding the wrongful acts of the Defendants? Now we know how it is that the Plaintiffs have in fact only got the reduced price which they did. It is in consequence of the action of the Defendants, who as soon as ever the Plaintiffs brought down their price to the price the Defen-

dants had adopted, again lowered their price and forced the Plaintiffs to reduce their price so as to prevent themselves from being kept out and left to sell nothing. There was the evidence of Mr. *Stokes*, the person acting for the Plaintiffs, and also travelling for them, that some person said: "We cannot buy yours; the Defendants are selling them at a cheaper rate, and we cannot, of course, take yours"; and it is very evident that the Plaintiffs here were put under the necessity of reducing their price in consequence of the wrongful act of the Defendants in selling these articles and selling them at a lower rate than that at which the Plaintiffs, who were the rightful owners of the property, were selling theirs.

I must advert here to what was pressed upon us, namely, that the Defendants were only imitating or only making one set of bustles. But we have had the various bustles produced to us here, and we could see that there was so much similarity between all these bustles that if the Plaintiffs reduced the price of one particular bustle they must necessarily reduce, if they hoped to sell the others at all, the price of those others. [His Lordship then considered the different patterns of the articles sold by the Plaintiffs, and continued:—]

Therefore, in my opinion, the Plaintiffs would be entitled here to have the larger amount of damages, namely, £8625, which the Official Referee has given to them, but which Mr. Justice *Kekewich* did not give to them. He gave them only £1654, and he did so, I think, on a misapprehension of the decision of the House of Lords, and especially of the reasoning of Lord *Macnaghten* in the case of the *United Horse Shoe and Nail Company* v. *Stewart* (1). I think that Mr. Justice *Kekewich* misapplied that judgment—Lord *Macnaghten* was dealing with an entirely different thing. He was not dealing with a case where the defendants were manufacturing a thing which could only be made by the plaintiffs, but they were manufacturing a thing which the plaintiffs had particular machinery for making, and there was the competition in the market of very similar nails to those which the plaintiffs made more cheaply by their machinery, and the defendants had been making a good many of these nails and selling them, using

(1) 13 App. Cas. 401.

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the machinery for which the plaintiffs had a patent. But the plaintiffs had not merely followed the lead of the defendants in reducing their prices, but they had always gone a little before the defendants in reducing their prices, and had reduced their prices below those at which the defendants were selling. We find that the prices were a certain sum, from which was deducted a varying discount, and the discount allowed by the plaintiffs was always greater than that allowed by the defendants. Therefore the Lord Ordinary came to the conclusion that the reduction of the price was made by them in consequence of the competition, not only of the defendants, but of other persons in the market. It was really therefore an operation in trade, in order to oust others who were interfering with them by a lawful competition. The plaintiffs were seeking to get as damages from the defendants the loss which they had sustained by that action on their part, which is entirely different from what was done here; because here it is found—and it was not so found by the Lord Ordinary in the former case—that the Plaintiffs would have sold all that had been sold at the original prices if it had not been for the wrongful acts of the Defendants. That is the ground, and the only ground, of their claim for damages; and the only other thing that has to be considered is, by what ought the damages payable by the Defendants to be diminished—which is an entirely different question. If one looks at Lord *Macnaghten's* judgment, it appears that he was dealing with the claim for this reduction of price as a claim for damages on that ground, and not as explaining how it was that the defendants got so little to diminish the damages to be paid by them. In my opinion, that decision has no application to the present case, and we ought not on that account to cut down the claim of the Plaintiffs to the smaller sum of £1654, which is only the sum which the Defendants in fact realised by the sales made by them. In my opinion, the appeal of the Plaintiffs here succeeds, and the cross-appeal of the Defendants fails.

LINDLEY, L.J.:—

The questions which arise on this appeal are based upon a finding of the Official Referee, who was directed to take an inquiry

as to damages in the usual form in a patent action. The successful patentee whose patent was infringed has the option whether he will take an account of profits made by the person infringing his patent, or if that person has been selling at so low a price that the profits are small, the patentee is entitled to an inquiry as to the damages which he has sustained by reason of the wrongful acts of the defendants. The Plaintiffs in this case elected to take the latter form of inquiry, namely, an inquiry as to damages, making no claim to profits at all. That is the inquiry with which the Official Referee had to deal, and the first question, and the question in my mind on which everything turns, is whether the Official Referee's finding as to the facts is right or wrong. The finding which is of importance is this. He says, "But for the Defendants' competition and their selling at lower prices, the Plaintiffs would, subject to the allowances mentioned in paragraphs 2, 3, and 4, have made the sales made by the Plaintiffs, and also those made by the Defendants at the Plaintiffs' original prices." I understand that finding to mean that, notwithstanding all competition from other sources, had it not been for the Defendants' competition, the Plaintiffs would have sold all those they did sell and all those which the Defendants sold. That is what the finding really means, and the question is whether that is right.

Now, the evidence upon that is conflicting. That there was some competition in the trade by reason of other bustles being on the market besides these braided wire bustles is plain enough from the evidence; but then, when we ask ourselves whether the evidence warrants this conclusion, I am not prepared to say it does not. I am not at all prepared to say, after reading the evidence with some care and hearing Mr. *Cohen's* observations on it, that the Official Referee is wrong in coming to the conclusion he does come to, that after making all allowance for competition of other bustles it is still true that but for the Defendants' competition the Plaintiffs would have sold all they did sell and all the Defendants sold at the higher prices.

Now, that being the case, I accept that as a fact, and if that is accepted as a fact, it appears to me that the difference between

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this case and *United Horse Shoe and Nail Company* v. *Stewart* (1) is plain and obvious.

Then, assuming that to be the fact, what are the damages? And here I will make the observation that it appears to me to be an entire fallacy to say in this case that the Plaintiffs are seeking damages for having to sell at reduced prices. They are not doing anything of the sort. In the Scotch case they were, and it was precisely that controversy and that contention of theirs which was negatived by Lord *Macnaghten*. In the Scotch case there was competition of the most formidable kind of other nails besides those made by the patentees' process, and entirely exclusive of the competition by the infringers of the patent. If one looks at Lord *Kinnear's* judgment (2), it will be seen that his reasoning is based entirely upon the absence of the fact which we have found here by the Official Referee. The patentees there were claiming, or seeking to claim, and endeavouring to substantiate not the damages properly referable to and occasioned by the wrongful act of the defendants, but they were claiming that which the Plaintiffs here do not claim at all—they were claiming damages in respect of this reduction of prices. Lord *Kinnear* rejects and Lord *Macnaghten* rejects that; and when you come to look at Lord *Kinnear's* judgment, which throws some light on Lord *Macnaghten's* judgment, it will be seen that they are addressing their minds to a claim of that kind, and not at all to the case where, notwithstanding competition of rival articles in trade, it is proved as a fact what we have found here by the Official Referee.

Now what are the facts? Is the Official Referee wrong in the principle which he has followed? He says, "I proceed on the assumption that the Plaintiffs would have sold at the original prices all they did in fact sell, *plus* all that the Defendants sold for them." He says, "Very well; that is an element in ascertaining the damage"—subject to what I shall presently mention—"that is the measure of damages which you have sustained by reason of the Defendants' wrongful act." But then, he says, "You cannot have all that, because you have not

(1) 13 App. Cas. 401. (2) 3 Rep. Pat. Cas. 144.

sustained in fact all that injury. You have sold some of these things at reduced prices; you must give credit for what you have received—of course you must." That reduces the damages which otherwise the Plaintiffs would have claimed; and if the Defendants say to the Plaintiffs, "You were wrong in reducing your prices," the answer is, "You forced us"—and that answer is perfectly conclusive. The Defendants are not able to prove that the Plaintiffs have increased their damages by what they have done, or that they might have reduced their damages still more. They have done nothing of the sort. What the Official Referee has done seems to me to be perfectly accurate. He has first of all looked on one side of the account and said what would have been their loss if that loss had not been mitigated, and he gives the Defendants credit for the sum by which it has been mitigated, and gives the Plaintiffs the rest. That appears to me absolutely right and absolutely in accordance with what Lord *Macnaghten* says is the sole question (1): "The sole question is what was the loss sustained by the appellants by reason of the unlawful sale of the respondents' nails? The loss must be the natural and direct consequence of the respondents' acts. In the first place, I think the claim for loss of profit, by reason of the reduction of price, must be rejected." It appears to me that that is absolutely right, and I cannot—perhaps it is defective imagination—put to myself a case where it can be right that a plaintiff can claim as damages the loss he has sustained by reducing his prices. It has no analogy to this case at all. I see they tried to do it in the Scotch case; but when the plaintiff shapes his case right, and when he says, "I claim as damages the loss which I have sustained by your wrongful conduct," the plaintiff puts his case on a basis which is perfectly correct, and is sound.

It appears to me, therefore, that Mr. Justice *Kekewich* has misunderstood that judgment of Lord *Macnaghten*, and that but for that he would have delivered the same judgment, which we think is right, and that is to give to the Plaintiffs these very large damages. I had no idea myself that the profits on the sale of bustles were so large; but it seems to have been a most lucra-

(1) 13 App. Cas. 416.

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tive trade, and those who have done wrong to the Plaintiffs must pay compensation for the wrong they have inflicted upon them.

LOPES, L.J.:—

This case really depends on the findings of the Official Referee, and the first question we have to consider in this cross-appeal is this: Are the findings of the Official Referee to be set aside, or are they to stand? There is no doubt that there was much conflicting evidence which was laid before the Official Referee with reference to the views of the Plaintiffs and the Defendants; but the evidence, taken as a whole, and carefully considered, to my mind is such as justified the Official Referee in finding as he has. The only doubt that I had was whether the Official Referee had taken into consideration the effect of the competition of what I may call the non-infringing bustles. We have had an opportunity of seeing the Official Referee, and in effect what he says is this: That there was really no competition—that nobody who wanted an infringing bustle would think of buying a non-infringing bustle; the superiority of the infringing bustle was too marked for any such competition. He says that this point was present to his mind, and on the evidence he came to the conclusion which we find in his report. The Official Referee had an opportunity of seeing the witnesses and hearing them, and hearing the very able arguments of the learned counsel who addressed him. I therefore am unable to say that the Official Referee was wrong in those findings. Then, if the findings are to stand, what damages are the Plaintiffs entitled to? They are entitled to all the loss occasioned by the wrongful act of the Defendants—all that is the direct and natural result of the wrongful act of the Defendants.

Now what is that in this case? It is the loss of profits which the Plaintiffs would have made at their original prices; for the Official Referee has found—and that is the most cogent part of his finding—that except for the competition of the Defendants the Plaintiffs would have sold at their original prices. But at the same time it has occurred to the Official Referee, and properly occurred to him, that in consequence of the Defendants' reduction in prices, the sales both by the Defendants and the

Plaintiffs have been increased; that there has been a greater sale of these patented bustles in consequence of that reduction by the Plaintiffs and Defendants than there would have been at the original prices. It has also occurred to the Official Referee (and I think rightly) that the Plaintiffs have, by the sale of the Defendants, benefited to some extent by the connection of the Defendants; and, taking these matters into consideration, he has made a reduction of ten per cent. on account of the connection of the Defendants, and twenty per cent. on account of the greater sale that has happened in consequence of this reduction. Now, when he has done this, in my opinion all that remains—that is, the £8625 19*s.* 10*d.*—is the direct and natural result of the Defendants' wrongful act.

The learned Judge, in his judgment, seems to have relied on the case of *The United Horse Shoe and Nail Company* v. *Stewart* (1). I think the learned Judge, if I may say so, has misunderstood the opinion of Lord *Macnaghten* in that case, because it is upon his opinion that he has acted. It seems not to have occurred to the learned Judge that in that case there were no such findings as in this case. It was not there found that the plaintiffs were compelled to reduce their prices owing to the defendants' reduction; nor was it found that the plaintiffs would have sold at their original prices except for the competition by the defendants. Any loss in that case arising from the reduction in prices was not attributable to the defendants' wrongful act, but arose from the voluntary act of the plaintiffs, who, apprehensive of competition in other quarters, took the initiative there and voluntarily reduced their prices when there was no reduction by the defendants. In that case the plaintiffs were claiming for a reduction which was most clearly not caused by the defendants' acts. I think when that statement is made it entirely explains the distinction between that case and the present, and to my mind that case has no application whatever. I think that the Plaintiffs are entitled to the amount of £8625 19*s.* 10*d.* which has been found by the Official Referee, and the result is that the Plaintiffs' appeal succeeds, and the Defendants' fails.

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R. W. Wallace asked that the costs should be on the higher scale.

COTTON, L.J.:—

The evidence is not scientific, but only evidence of fact, and I do not see any reason why these costs should be on the higher scale.

Solicitors: *Burn & Berridge; Witham, Lambert, & Roskell.*

M. W.

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May 7

WHITTAKER *v.* KERSHAW.

[1887 W. 776.]

Practice—Security for Costs—Married Woman.

A married woman who has no separate property except property which she is restrained from anticipating, and who appeals without a next friend, must give security for the costs of the appeal.

THE Plaintiffs were the executors of *William Kershaw*, who died in 1886. In March, 1887, the testator's son, *John Kershaw*, assigned his interest in the testator's residuary estate to his wife, the Defendant *Harriet Kershaw*, as her separate estate. On the 29th of April, 1887, Mr. and Mrs. *Kershaw* executed a release to the Plaintiffs. After this the Plaintiffs were obliged to pay, on the 3rd of January, 1888, a call amounting to £25 on some shares held by the testator, the certificates for which had been delivered to Mrs. *Kershaw*, but the shares had not been transferred. Mrs. *Kershaw* refused to repay them, and they took out an originating summons, claiming a lien on the shares for the call and costs. An order was made on the 23rd of February, 1888, declaring that they had a lien for the call, interest, and costs, directing the costs to be taxed, and, in default of payment of call, interest, and costs, the Plaintiffs were to be at liberty to sell the shares. The costs were taxed at £67 18*s.* 9*d.* Mrs. *Kershaw* refused to pay, and the shares were sold for £26 5*s.*

The Plaintiffs then, in March, 1889, brought this action against Mrs. *Kershaw*, to compel her to indemnify them. Mrs. *Kershaw*,

by her statement of defence, stated that she had not at the commencement of the action, nor at the time of delivering her defence, any separate estate which was not subject to a restraint on alienation.

By the judgment in the action given on the 4th of March, 1890, it was declared that the Plaintiffs were entitled to be indemnified out of the testator's residuary estate against the £25, with interest from the 3rd of January, 1888, and against so much of the £67 18*s.* 9*d.* as did not relate to costs of the originating summons, such amount to be certified and against their costs of this action, to be taxed as between solicitor and client. And it was ordered "that the Plaintiffs recover against the Defendant *Harriet Kershaw* the said sum of £25 and interest, the said costs to be certified, and costs to be taxed, such amount to be payable out of her separate property, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the said Defendant not subject to any restriction against anticipation, unless, by reason of sect. 19 of the *Married Women's Property Act*, 1882, the property shall be liable to execution notwithstanding such restraint."

On the 29th of March the Defendant's solicitors, in reply to a letter asking whether Mrs. *Kershaw* would pay the amount directed by the judgment to be paid, answered that she had no separate estate out of which she could pay it.

Mrs. *Kershaw*, on the 21st of April, gave notice of appeal against the judgment, and the Plaintiffs now applied for security for the costs of the appeal.

Mrs. *Kershaw*, by affidavit, in opposition to the motion, deposed that, under a will and settlement, she had a considerable income, which she was restrained from anticipating, and that when she instructed her solicitors to make the statement in the letter of the 29th of March, she "intended to convey the fact that I had no separate estate at that time other than that which I am restrained from anticipating under the said will and marriage settlement respectively."

Upjohn, for the application :—

The Appellant is a married woman with, as she says, no sepa-

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rate estate except what she is restrained from anticipating; so, according to her own shewing, if her appeal is dismissed with costs, we shall have no chance of recovering them.

E. Ford, for the Appellant:—

There may be arrears of separate income from which costs could be recovered. The Plaintiffs have gone on with their action after notice that Mrs. *Kershaw* had no separate estate free from restraint on anticipation, so they must be of opinion that they have some means of enforcing payment. Security will not be ordered unless there is evidence that the Appellant is unable to pay the costs—and here the Appellant is in receipt of a good income.

COTTON, L.J.:—

In my opinion this is a case where security ought to ordered. It is not correct to say that the Court never orders security unless it is shewn that the appellant is unable to pay costs. The question is, whether he has any property against which payment can be enforced by the respondent. Here a married woman, who is restrained from anticipation, appeals without a next friend, and, as she has no property which can be attached, she ought to give security. If she is satisfied that no judgment can be enforced against her, it is extraordinary that she has thought it worth her while to appeal.

LINDLEY, L.J.:—

I am of the same opinion.

BOWEN, L.J., concurred.

Solicitors for Plaintiffs: *Woodcock, Ryland & Parker*, for *Tweedale, Sons & Lees, Oldham.*

Solicitors for Defendant: *Pitman & Sons*, for *J. E. & R. Whitworth, Manchester.*

H. C. J.

SERLE *v.* FARDELL.

KAY, J.

1890

Jan. 24.

[1888 S. 2987.]

Practice—Official Referee—Entering up Judgment—Motion to set aside Judgment—Appeal—Jurisdiction—Judicature Act, 1873, *s.* 57—*Rules of Supreme Court,* 1883, *Order* XXXVI., *rr.* 50, 52*a* (*Rules of Dec.* 1889).

When judgment has been actually entered up pursuant to a direction by the Official Referee under Rules of Supreme Court, 1883, Order XXXVI., rr. 50 and 52a (Rules of Dec. 1889), it is too late for the unsuccessful party to apply to a Court of First Instance to move by way of appeal to set aside the judgment; his proper course is to go direct to the Court of Appeal.

THIS was an action for alleged interference with the Plaintiff's ancient lights. On the 11th of July, 1889, when the action came on for trial, his Lordship made an order directing that the action, and in particular the question whether the Defendants' new buildings had been raised higher than their old buildings, and, if so, whether their additional height materially diminished the access of light to any and which of the ancient windows of the Plaintiff's house, should be tried before the Official Referee under sect. 57 of the *Judicature Act,* 1873, "who is to decide what is to be done, and to deal with the costs, and to direct judgment to be entered accordingly."

By his award, dated the 3rd of December, 1889, the Official Referee found that of the Defendants' new buildings part had been raised higher than the old, but part not, and that the part raised higher did not materially diminish the access of light to the Plaintiff's ancient windows; and he directed "Judgment to be entered for the Defendants against the Plaintiff, with costs." Judgment was duly entered accordingly on the 7th of December, 1889.

The Plaintiff now moved, under notice dated the 21st of December, 1889, "on appeal from the judgment of the Official Referee," for an order that such judgment might be reversed and judgment entered for the Plaintiff, or a new trial had, on the ground that the Official Referee was wrong in point of law in

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giving judgment for the Defendants, and that his findings were against the evidence; and also that the time for appealing against the judgment of the Official Referee might be extended.

To this motion the preliminary objection was raised that a Court of First Instance had no jurisdiction to set aside an award of the Official Referee after judgment had been entered up on it.

Millar, Q.C., and *E. Knowles Corrie*, for the Defendants:—

This motion is misconceived. Having sent the whole action to the Official Referee, your Lordship divested yourself of all further jurisdiction in the matter; and the judgment that has been entered up is the judgment of the Court, from which the Plaintiff's only remedy lies to the Court of Appeal. It is too late to impeach the Official Referee's report after judgment has been entered up on it: *Bedborough* v. *Army and Navy Hotel Company* (1); *Dyke* v. *Cannell* (2).

Marten, Q.C., and *E. Boyle*, for the Plaintiff:—

Neither of the cases cited applies to the present case, in which judgment has been actually entered up. The Court has inherent jurisdiction to set aside a judgment improperly entered.

KAY, J.:—

The simple question involved in this preliminary objection is whether this Court has power to set aside the award of the Official Referee after the judgment of the Court has been entered up on it. If the Court itself had directed judgment to be entered up, no one could doubt that it would be too late to apply afterwards to set aside the award. Taking the analogous case of a certificate made by the Chief Clerk, if the Court has made an order on that certificate, it is too late, after that order, to move to vary the certificate. So in the case of an award made by the Official Referee, I find no power under the rules to set aside that award after judgment has been entered up. In the present case the Official Referee decided the questions submitted to him. Under Order XXXVI., rule 50, of 1883, and Order XXXVI., rule 52a, of

(1) 53 L. J. (Ch.) 658. (2) 11 Q. B. D. 180, 183.

1889, he directed judgment to be entered up on his findings, and thereupon judgment was entered up; and after judgment had been thus entered this application is made to set aside his findings of the facts, and to enter a different judgment. The question is whether I have jurisdiction to do that. Under the old practice which existed under the rules of 1875, before the present rules of 1883 came into operation, the opinion of at least one learned Judge of the High Court was expressed upon the point in *Dyke* v. *Cannell* (1). The question in that case was as to the proper course to be adopted by the unsuccessful party to a reference under sect. 57 of the *Judicature Act*, 1873, where he desired to question the finding of the Official Referee, and it was decided that it was proper to move on notice to set aside the findings. There were two motions before the Court: one by the plaintiff for judgment on the findings, and the other by the defendant to set aside the findings and to remit the action to the Official Referee. The preliminary question was whether this latter motion was a proper course for the defendant to adopt, and the Court decided that it was. In giving judgment, Mr. Justice *Cave*, after referring to rule 34 of Order XXXVI., of the rules of 1875, which was substantially identical with rule 52 of Order XXXVI. of the rules of 1883, said this (2): "The report of a Referee has no effect so long as it remains a report. To produce any result it has to be adopted by the Court. If the party seeking to impeach the report does not do so before judgment has been given upon it, he is too late, because after judgment the report has no further value, and it is the judgment, and not the report, that is relied on by the successful party, but so long as the report of the Referee is unconfirmed by a judgment of the Court I think it may be impeached. This seems to me to be a natural mode of procedure and to be that provided for by the rules." Here I have the opinion of a learned Judge who had evidently considered the matter very carefully. The effect of it is that, after judgment has been entered, it is too late to move to set aside the Referee's report. I confess that seems reasonable. How can the Court more formally adopt the report of the Official Referee than by entering up judgment upon it?

(1) 11 Q. B. D. 180. (2) 11 Q. B. D. 183.

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And Order XXXVI., rule 50, of 1883, and Order XXXVI., rule 52a, of 1889, enable the Official Referee to do that which otherwise only the Court itself could do, namely, to direct judgment to be entered up. That the party dissatisfied with the judgment may go to the Court of Appeal is not for one moment contested; but the question is whether a Court of First Instance has jurisdiction, when judgment has been entered up on the finding of the Official Referee, to alter this finding and set aside the judgment. In the absence of any rule to that effect I answer, It has not. It is too late to come and say the finding is wrong after judgment has been entered up on it. It is not denied that the award in this case was regular and proper in form, and that judgment was duly entered up on that award: and if the question is whether, in order to have that judgment reversed, the Plaintiff should come here or go to the Court of Appeal, in my opinion he should go to the Court of Appeal.

I refuse the motion, with costs.

Solicitors: *Digby & Liddle; Saffery, Huntley, & Son.*

G. I. F. C.

In re SMITH, PINSENT & CO.

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1890

March 26.

Practice—Costs—Taxation—Attempted ineffectual Sale of Real Estate—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *r.* 2 (*c*), *Sched. I. Part* 1, *r.* 2, *Sched. II.*

The costs of an attempted ineffectual sale of property, when there is no probability of the sale being effected for some years to come, should be taxed under rule 2 (*c*) of the General Order made in pursuance of the *Solicitors' Remuneration Act,* 1881.

ADJOURNED SUMMONS.

This was a summons taken out by a firm of solicitors to review a taxation.

The solicitors were employed in April, 1886, by the trustees and executors of *Caroline Brindley* deceased, and were directed by them to take the necessary steps to sell the estates devised by the will of the testatrix, and accordingly the estates were, on the 6th of August, 1886, put up for sale by public auction in fourteen lots; but at that sale only one small lot was sold, the others being withdrawn or no bidding made.

The solicitors having sent in their bill of costs, made out under Schedule II. of the *Solicitors' Remuneration Act,* 1881, in relation to proving the will of the testatrix and other matters connected with the estate and the realization thereof, and the trusts of the will, including the fees and disbursements in connection with the above-mentioned abortive sale by auction, the trustees at the suggestion of the solicitors on the 7th of February, 1889, obtained the common order to tax.

The Taxing Master only allowed the scale charge for the lot actually sold, and disallowed the costs and disbursements connected with the attempted sale of the remaining lots.

The solicitors carried in their objections to the taxation, from which it appeared that on the 14th of June, 1889, the solicitors, acting on the instructions of the trustees, caused the unsold part of the estates to be again put up for sale in eleven lots, and at that sale only one lot was sold, all the others being either withdrawn or no bidding made, and that it was felt to be most desirable for the interests of the estate that no further attempt to sell

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the same should be made for, at any rate, some considerable time, so as to afford a chance of an improvement in the value of property, and that there was no intention or prospect of any further sale being attempted for some time to come.

The Taxing Master refused to allow the objections, giving the following reasons:—"I have considered the above objections and disallow the same. I have allowed in the bill of costs taxed by me the scale charge for the lot sold at the auction.

"There is provision in the *Solicitors' Remuneration Act*, 1881, for the allowance of scale charges when property is not sold at the auction, but sold subsequently. To allow the items objected to according to Schedule II. might give the solicitor twice or thrice the amount he would be entitled to under the scale if the property had been sold. It could not have been intended to give more for doing half the work than the amount would have been if the business had been completed. The solicitor will receive at a subsequent period (the scale charge) when the property is disposed of, and in addition the charges provided for under rule 2" (meaning rule 2 of Sched. I., part 1).

It appeared that under an order made by Mr. Justice *North* the trustees had liberty to raise, and had raised by mortgage, the sum required for the present purposes of the estate.

R. F. Norton, for the Applicants:—

The solicitors in this case have not completed the whole of the work, and they are entitled to have their bill taxed under rule 2 (*c*) of the General Order under which the remuneration is to be regulated according to the present system as altered by Schedule II. The decision of Mr. Justice *Kay* in *In re Dean* (1) is in our favour, as there he decided that the costs of solicitors who had acted in an abortive sale, the subsequent sale having been carried out by other solicitors, must be dealt with under rule 2 (*c*) as it was clear they would not act on a future sale. In this case, although there is no such certainty, yet it is clear that under any circumstances they will not act probably for many years to come, and it is an obvious injustice that they should be paid nothing till they do act.

(1) 32 Ch. D. 209.

If years hence the same solicitors do act in a successful sale, they will be allowed costs on the principle laid down in *In re Dean* (1), and what they are allowed now will have to be deducted from the scale charge.

CHITTY, J.:—

As the money required has been raised by mortgage, it is unlikely that the property will again be put up for sale for some years to come; the solicitors are not bound to wait to be paid for their services in respect of the abortive sale which has already occurred, and the matter must be remitted to the Taxing Master to tax the items disallowed in accordance with rule 2 (*c*) of the General Order.

If the same solicitors are employed at a future time to conduct a sale which is successful, they will not be paid twice over, but on a *quantum meruit* basis, and not on the scale charge; if, however, they ask to be paid on the scale charge, they will have to bring into account what they have already received. The costs of this application will be costs in the taxation.

Solicitors: *Field, Roscoe & Co.*, for *Smith, Pinsent & Co., Birmingham.*

(1) 32 Ch. D. 209.

G. M.

CHITTY, J. 1890 April 18.

MACNEE v. PERSIAN INVESTMENT CORPORATION.

[1890 M. 894.]

Company—Illegal Contract—Lottery Loans—Prospectus—Advertising Foreign Lottery—Lottery Acts, 9 *Geo.* 1, *c.* 19, *s.* 4 [*Revised Ed. Statutes, vol. ii., p.* 311]—6 *&* 7 *Will.* 4, *c.* 66 [*Revised Ed. Statutes, vol. vii., p.* 1058].

A company, formed to acquire and work a concession conferring the exclusive privilege of conducting all operations in connection with lottery loans in *Persia*, issued a prospectus which referred to the profits made on the Continent by lotteries, and stated that the operations of the company would be conducted upon the lines adopted by European states where government lotteries were in vogue, and that "at least five issues have to be made annually in *Persia* with minimum drawings of £10,000, and it is estimated that these operations should return continuously increasing dividends." The company had agreed to purchase this concession. A shareholder commenced an action to restrain the company from acquiring, and from publishing any prospectus or scheme relating to the acquisition of, this concession, and from publishing any advertisement or notice in any manner relating to such lottery loans, and from applying the funds of the company in the purchase of the said concession, contending that the enterprise of the company was illegal and in contravention of the *Lottery Acts*:—

Held, that the proposed purchase of the concession was lawful: that the company were not attempting to erect or set up any lottery in this country within the meaning of 9 Geo. 1, c. 19, s. 4: that the general statements in the prospectus did not amount to a publication, advertisement or notice of a foreign lottery within the meaning of 6 & 7 Will. 4, c. 66: and that the action must therefore be dismissed.

MOTION.

The above-named company was registered on the 26th of November, 1889, with a capital of £275,000, divided into 54,000 ordinary shares of £5 each, and 500 founders' shares of £16 each. The objects for which the company was established, as set out in its memorandum of association, were, so far as material for the purposes of this report:—

(1.) To acquire any concessions, rights, or privileges for any objects or purposes whatsoever, granted or to be granted by His Majesty the Shah of *Persia*, or by any other sovereign, state, government, power or authority, which the company may think capable of being profitably dealt with, and to carry into effect,

work, exercise, or otherwise turn to account, deal with, or dispose of, any such concessions, rights or privileges.

(2.) To carry on all kinds of financial and banking business and in particular to negotiate loans and advances, to offer for subscription, place, buy, sell, and deal in shares, bonds, obligations, stock, bills, notes, and securities of all kinds.

(11.) Generally to carry on business as a capitalist, and to undertake and carry out all kinds of transactions and operations (except life assurance) which might be lawfully undertaken and carried out by a private individual capitalist.

(19.) To adopt and carry into effect, with or without modification, the agreement referred to in clause 3 of the company's articles of association.

The agreement referred to in clause (19) was a contract of the 15th of November, 1889, between *The Anglo-Asiatic Syndicate, Limited*, of the one part, and *John Thorly*, as trustee for the then proposed company, of the other part, for the purchase by the company for £220,000, in cash and shares, of a concession granted on the 20th of July, 1889, by the Shah of *Persia*, of the exclusive right and privilege, for a period of seventy-five years from the date of the concession, of initiating and conducting, throughout the whole of the Persian empire, all operations relating to loans, redeemable by drawings with bonuses and lotteries, and the promotion of lottery companies, and the sale of lottery tickets.

On the 25th of November, 1889, a prospectus was issued and advertised in the usual way, inviting the public to take shares, which stated that the company was formed to acquire and work concessions granted by the Shah for lottery loans, and also contained the following statements: "The granting of an important concession of this special nature, with all its attendant rights and privileges, is almost, if not quite, unique in the annals of fiscal procedure, for the profits inseparably connected with business of the character in question are most remunerative; in fact, several continental nations—notably *Austria-Hungary, Italy, Spain*, &c.—to a certain extent rely for revenue upon the government lottery schemes, which they support by every means in their power. The income so derived cannot be ascertained with absolute accuracy as regards every continental nation resorting to this

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method of increasing the revenue; but the details are forthcoming with respect to both *Italy* and *Austria-Hungary*, and in these states the net revenue from this source is, according to authorities, respectively £3,052,000 and £2,150,000 per annum. The head-quarters of the system will be in *Persia*; but the company will not be limited to that country in the field of its operations, for it is intended, as in the case of the continental issues above referred to, that the company should be represented by agents in the chief cities of Eastern *Europe* for the purpose of obtaining subscriptions."

"The intended operations of the company will (pursuant to the terms of the concession) be conducted generally upon the lines adopted in the European States where government lotteries are in vogue. At least five issues have to be made annually in *Persia*, with minimum drawings of £10,000, and it is estimated that these operations should return continuously increasing dividends."

"It is known that lottery loans, in which there are chances of drawings with prizes, are a favourite form of investment, not only with Persian and Oriental capitalists generally, but also for the savings of other classes of the community, who for years past have invested largely in Greek and other loans. It is confidently expected that whenever the government requires to raise money, local lottery loans issued by the company under its auspices will be preferred by native investors, and afford an attractive outlet for the employment of native capital."

In the month of January, 1890, the secretary of the company received a letter from Sir *A. K. Stephenson*, the solicitor to the Treasury, warning him that the enterprise of the company was, in the opinion of the Government, illegal, and in contravention of the *Lotteries Acts*, and threatening a prosecution. A correspondence thereupon ensued; but no proceedings were instituted by the Treasury.

On the 27th of March, 1890, the Plaintiff, *Daniel Macnee*, a holder of 150 shares, commenced this action on behalf of himself and all other the shareholders in the Defendant company except such as were Defendants against the company and its directors, claiming an injunction to restrain the Defendant company from acquiring or dealing with, and to restrain all the Defendants

from printing or publishing or causing to be printed or published any prospectus, proposal, or scheme for or relating to the acquisition by the Defendant company of the concession of the 20th of July, 1889, from the Shah of *Persia*, for conducting operations in connection with lottery loans or other similar issues in *Persia*, or any other concession for the like purpose, and from printing or publishing any prospectus, advertisement, or notice in any manner relating to such operations or lottery loans, and from applying or pledging any of the funds of the Defendant company in or towards or for the purpose of the acquisition of the concession aforesaid, or any such other concession or for any purpose connected therewith or in relation thereto.

The Plaintiff now moved for an *interim* injunction in terms similar to those contained in his writ of summons.

Counsel for the Defendants stated that the directors at present had no intention of issuing or advertising any further prospectus, as the first prospectus had done its work; but as they had been advised that the objects of the company were perfectly legal, they were instructed to refuse to give any undertaking on the subject.

Byrne, Q.C., and *J. G. Wood*, for the motion:—

First, we say that the acquisition by the company of this concession under the agreement of the 15th of November, 1889, is unlawful, though it is within the objects given in its memorandum of association, and we wish to prevent the shareholders' money from being spent in the performance of an illegal contract; it is impossible for the company to derive any benefit from this concession without violating the provisions of the *Lotteries Acts*.

What the company proposes to do is, within the words of 9 Geo. 1, c. 19, s. 4 (1), to erect, set up, or keep, or procure to be

(1) 9 Geo. 1, c. 19, s. 4: "'And whereas, in order to elude the many good Laws made for suppressing unlawful Lotteries, several evil disposed Persons have of late presumed to erect and carry on several Lotteries, upon Pretence and Colour of some Grant or Authority given by foreign Princes or States;' For the better preventing of which illegal Practices for the Future, Be it declared and enacted by the Authority aforesaid, That if any Person or Persons shall, from and after the first day of July one thousand seven

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erected, a lottery under authority from a foreign state, and then by the prospectus the company is "publishing" a scheme for such lottery within the very words of this section.

Further, we say that the prospectus generally, and particularly the statement that "at least five issues have to be made annually in *Persia*," is an advertisement or notice of a foreign lottery within the provisions of 6 & 7 Will. 4, c. 66 (1), and illegal. Though the Acts referred to are penal Acts, still, if we shew that

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hundred and twenty-three, by Virtue or Colour of any Grant or Authority from any foreign Prince, State or Government whatsoever, erect, set up, continue, or keep, or shall cause or procure to be erected, set up, continued or kept, any Lottery or Undertaking in the Nature of a Lottery, under any Denomination whatsoever, or shall make, print or publish, or cause to be made, printed or published, any Proposal, or Scheme for any such Lottery, or undertaking, or shall within this Kingdom sell or dispose of any Ticket or Tickets in any foreign Lottery, and shall be convicted of any the said Offences, upon the Oath or Oaths of one or more credible Witness or Witnesses, by two or more Justices of the Peace of the County, Division or Liberty where such Offence shall be committed, or the Offender shall be found (which Oath such Justices of the Peace are hereby empowered and required to administer), the Person so convicted shall, for every such Offence, (over and above any former penalties inflicted by any former Act or Acts of Parliament made against unlawful Lotteries) forfeit the Sum of two hundred Pounds."

(1) 6 & 7 Will. 4, c. 66: An Act to prevent the advertising of Foreign and other illegal Lotteries.

[18th August, 1836.]

"'Whereas the Laws in force are insufficient to prevent the advertising of Foreign and other illegal Lotteries in this Kingdom, and it is expedient to make further Provision for that Purpose:' Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act if any Person shall print or publish, or cause to be printed or published, any Advertisement or other Notice of or relating to the drawing or intended drawing of any Foreign Lottery, or of any Lottery or Lotteries not authorized by some Act or Acts of Parliament, or if any Person shall print or publish, or cause to be printed or published, any Advertisement or other Notice of or for the Sale of any Ticket or Tickets, Chance, or Chances or of any Share or Shares of any Ticket or Tickets, Chance or Chances of or in any such Lottery or Lotteries as aforesaid, or any Advertisement or Notice concerning or in any Manner relating to any such Lottery or Lotteries, or any Ticket, Chance, or Share, Tickets, Chances, or Shares, thereof or therein, every Person so offending shall for every such Offence forfeit the Sum of Fifty Pounds."

what the company proposes to do is illegal, we are entitled to come here for an injunction.

[*Sykes* v. *Beadon* (1) was mentioned, and 9 Anne, c. 6, s. 56, 10 & 11 Will. 3, c. 17 and 8 Geo. 1, c. 2, s. 36, were also referred to.]

Romer, Q.C., and *G. F. Hart*, for the Defendants:—

It is not illegal to take shares or tickets in a foreign lottery, or to form a company to take shares or tickets in a foreign lottery. What the company proposes to do is legal; it is not erecting or setting up a lottery within the meaning of 9 Geo. 1, c. 19, s. 4; if this is correct, then we are not within the provisions of that section as to printing or publishing a scheme, for the words are publishing "any proposal or scheme for any such lottery," *i.e.*, the lottery defined by the earlier words of the section.

The more general statement, that "five issues have to be made annually in *Persia*," is not within 6 & 7 Will. 4, c. 66, which only meant to prohibit advertisements or notice of some particular and defined lottery with a view to obtaining subscriptions for that particular lottery or drawing.

Then what interest has the Plaintiff? He will not be liable for any of the penalties even if what we propose to do is illegal; the motion is wholly misconceived, and should be dismissed.

Byrne, in reply.

CHITTY, J.:—

Two points are raised on this motion. The first and the most important point is this. It is said that the company, by its directors, are about to apply their money in the performance of an illegal contract. The case is not one of an illegal company, for it has not been contended, nor can it be contended, that the company has among the objects, on the face of the memorandum, any object or any purpose which is illegal, and it is admitted that the contract for the purchase of this concession is within the powers of the company; but it is said that the contract itself is an illegal one, and this contract is impeached by the notice of motion.

(1) 11 Ch. D. 170.

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The illegality alleged is illegality under the *Lotteries Acts*, and the only Act that counsel for the Plaintiff has been able to point to as being the Act which makes the contract illegal is the Act of 9 Geo., 1 c. 19, s. 4. [His Lordship read this section, and continued:—]

Now, is the contract that I have mentioned a contract falling within the scope of that section? The words principally relied on were "erecting, setting up, continuing, keeping, or causing or procuring to be erected or set up." The company, by virtue of its contract, do not propose to set up any lottery in this country. The proposal, or the object of the contract, is very simple. In *Persia*, I take it, seeing that the concession has been granted by the Shah, lotteries are lawful, and this company proposes, under the concession, to set up lotteries in that country. This Act of Parliament is not addressed to such a case as that; it is unquestionably directed against the erection of lotteries in this country; but the Legislature of *Great Britain* of that day did not intend to exercise any jurisdiction over lotteries in foreign countries, kept and carried on exclusively in foreign countries; and there is nothing in this Act, nor indeed in any of the Acts that I have been referred to, which would prevent two Englishmen in this country, British subjects, from putting together a fund for the purpose of employing that fund in erecting a lottery in a foreign state, where foreign lotteries are lawful. By no ingenuity can the case be brought within that section; and it is to be borne in mind, in considering these *Lotteries Acts*, that they are particular enactments directed to particular offences, which are specified; and I am not at liberty to take some general notion of what may, or may not have been, the intention of the Legislature, because I am here dealing with criminal law, and it is important to remember that the Act of Parliament is so framed as to create and deal with specific offences. It is said, as part of the argument for the Plaintiff, that it would be impossible for the company to perform this agreement without violating in some way or other the provisions of some other portions of the *Lotteries Acts*. I see no foundation whatever in that proposition. I am not at liberty to speculate, and say that the company, who can perform its opera-

tions lawfully and without violating the Act of Parliament, will probably do something which will bring it within some one or other of the *Lotteries Acts*. That is not my function sitting here as a Judge. Turn it over in what way I can, I can find no ground for the suggestion that this is an illegal contract; and there is no ground therefore for restraining the company from applying its money in the way it proposes. That is the main point of the motion; but there is a subordinate one, founded on the prospectus. The company have issued this prospectus, they have obtained their capital, and, as has been stated in the correspondence with Sir *Augustus Stephenson*, they do not intend to issue any further prospectus. But the Plaintiff says that he has got no undertaking from the company that they will not issue some further prospectus, and that they may, and probably will, put forward to the public another prospectus similar, or somewhat similar, to the one that I have before me. Then it is argued that the prospectus which they have actually issued, and which prospectus has done its business, is an illegal one. Now the material parts of the prospectus which are attacked by the motion are these: "The head-quarters of the system will be in *Persia*; but the company will not be limited to that country in the field of its operations, for it is intended, as in the case of the continental issues above referred to" (the continental issues above referred to relate to *Italy, Austria-Hungary, Spain*, &c.) "that the company should be represented by agents in the chief cities of Eastern *Europe* for the purpose of obtaining subscriptions." It is plain, therefore, that the company upon that statement in the prospectus does not propose to seek for subscriptions to lotteries in this country. Then the following paragraph was relied on by the Plaintiff: "The intended operations of the company will" (pursuant to the terms of the concession) "be conducted generally upon the lines adopted in the European states where Government lotteries are in vogue. At least five issues have to be made annually in *Persia*, with minimum drawings of £10,000, and it is estimated that these operations should return continuously increasing dividends." It is said that that is an advertisement or notice of lotteries to be held in *Persia*. Now the Act of Parliament relied on by the

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Plaintiff on this point is the 6 & 7 Will. 4, c. 66. The title of that Act is, "An Act to prevent the advertising of Foreign and other Illegal Lotteries." [His Lordship read the Act, observing that the important words on the question before him were, "any advertisement or other notice of or relating to the drawing, or intended drawing, of any foreign lottery," and continued :—]

This again is a particular and special enactment; and the only words that the Plaintiff could rely upon as bringing the case within this enactment are the latter general words, namely, "any advertisement or notice concerning or in any manner relating to any such lottery or lotteries." Now, I am dealing with this question on a motion for an injunction, and I am not really called upon to express an opinion with reference to this prospectus, because the Defendants have said that they do not intend to issue another prospectus of similar effect, and merely at the Bar they refuse to give an undertaking. I am not prepared to say in circumstances of that kind that the Plaintiff is, without any other evidence than the issue of this prospectus, entitled to call upon the Court to hold as a matter of inference that there is an intention hereafter to issue a similar prospectus, and that that intention is to be inferred from the act already done—the refusal to give the undertaking—and that this intention is to be inferred notwithstanding the statement in the correspondence with the Government to the effect that the prospectus has been issued and there is no intention to issue any further prospectus. But if I am called upon to express an opinion upon the point, I hold that this prospectus is not within those general words at the end of the section—in other words, it is not within the section. There is no lottery that has been set up, that has been opened, that has been commenced; there is no invitation in this prospectus to anybody to subscribe to the lottery or to take tickets in the lottery; it is a mere statement that at least five issues have to be made annually in *Persia*—that is the material part of the statement. Supposing a newspaper dealing with public news said, "There are five state lotteries held every year in *Austria*," if the Plaintiff's proposition is right, that is an offence against the Act. I think that would be straining the Act, and that that is not the offence

that the Act must mean. I am purposely very careful in what I say with regard to any Act of Parliament of this sort, because I am not disposed in any way to make observations which may lessen the effect of the enactment; and it appears to me that I discharge my duty rightly in this case, supposing I am bound to decide this question, by holding, as I do, that this prospectus is not within the Act of Parliament.

The mere general statement that there will be at least five issues to be made annually in *Persia* with minimum drawings of £10,000, I say is not an advertisement or notice of any such lottery within the meaning of that section.

Then there is the further point, supposing that what I have said is not well founded. On the second point, what interest has the Plaintiff? The Act is a penal Act, and the persons who contravene the Act will be the agents of the company, who issue the advertisements. What has the Plaintiff to do with that? He will not be liable, and they cannot make him under any criminal law responsible for their acts, and he cannot, of course, after what has taken place, in any way be liable, although he has taken shares in this company, and though this prospectus was before him when the shares were taken; he may or may not have read it, but that is quite immaterial; he cannot be said to have caused to be printed or published any such advertisement or notice as that which he is afraid may hereafter be issued. Therefore, he has no sufficient interest in the question to justify his motion on that point.

Upon these grounds, the first question being the substantial one, and the second question being comparatively trifling, I refuse the motion; and, as this is by consent to be treated as the trial, I refuse it with costs; in other words, the action will be dismissed with costs.

Solicitors: *Faithfull & Owen; Michael Abrahams, Sons & Co.*

W. C. D.

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1890
March 22.

In re OLIVE'S ESTATE.

Company or Public Body—Compulsory Purchase of Land—Payment of Purchase-money into Court—Subsequent Mortgage of Share—Petition for Payment out—Costs of Mortgagee—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 80 [*Revised Ed. Statutes, vol. ix., p.* 646].

Land in settlement having been taken compulsorily by a public body under the *Lands Clauses Consolidation Act*, 1845, and the purchase-money paid into Court, a reversioner mortgaged his reversionary interest in the fund. After the death of the tenant for life a petition was presented for the payment of the money out of Court, and the mortgagee was served:—

Held, that the public body must pay the costs of the mortgagee's appearance, those costs being limited to 42*s.*, and that they must also pay the costs of serving the mortgagee with the petition.

In re Gough's Trusts (1) dissented from.

Re Jones' Trust Estate (2) not followed.

PETITION for the payment out of Court of money paid in by the corporation of *Cheltenham*, as the purchase-money of a copyhold house and premises taken by them under their compulsory powers with which the *Lands Clauses Consolidation Acts* were incorporated.

Walter Olive, by his will, dated the 11th of October, 1844, devised the house and premises to trustees in fee, upon the trusts therein declared, one of the trusts being, as to a third part of the rents and profits thereof to permit his sister, *Charlotte Olive*, to enjoy the same for her life, for her separate use, without power of anticipation, and after her death as to, as well the third part of the house and premises as the third part of the annual rents thereof thenceforth to become due, upon trust for such of the children of *Charlotte Olive* as should attain twenty-one, as tenants in common in fee. The will did not give the trustees any power to sell the premises.

The testator died on the 7th of November, 1844.

Charlotte Olive, on the 12th of September, 1845, married *Frederick Rodway*. She died on the 7th of January, 1890. She had no other husband. She had four children who attained twenty-one, viz., *Charlotte Amelia Rodway*, *Frederic T. C. Rodway*,

(1) 24 Ch. D. 569. (2) 18 W. R. 312.

Constance L. M. Butler (the wife of *Edmund G. Butler*) and *Oliver M. Rodway.*

In the year 1885 the corporation of *Cheltenham* acquired the house under their compulsory powers for the sum of £3580, which sum they paid into Court on the 17th of March, 1885. The surviving trustee of the will conveyed the house to the corporation.

On the 19th of June, 1888, *Charlotte Amelia Rodway* executed a mortgage of her reversionary interest in the fund in Court to secure an advance of £120.

No settlement was made on the marriage of Mrs. *Butler.* On the 1st of February, 1890, she and her husband executed a mortgage of her share in the fund in Court as security for an advance of £100.

Oliver M. Rodway was in *Australia.*

The petition was presented by *Charlotte Amelia Rodway, Frederic T. C. Rodway,* and Mr. and Mrs. *Butler,* and it asked for the payment out of their respective one-fourth shares of one-third of the fund in Court to them and their respective mortgagees.

The petition was served on the mortgagees, the surviving trustee of the will, and the corporation of *Cheltenham.*

The only question was, whether the corporation ought to pay the costs of the appearance of the mortgagees.

Micklem, for the Petitioners:—

The corporation ought to pay the costs of the mortgagees. These costs are not "occasioned by litigation between adverse claimants," within the meaning of sect. 80 of the *Lands Clauses Consolidation Act,* 1845. The corporation ought to pay the costs occasioned by reason of the owners of property, which they have taken compulsorily, dealing with it in the ordinary way after the purchase-money has been paid into Court. In *In re Brooshooft's Settlement* (1) a railway company had taken under their compulsory powers land comprised in a settlement, and had paid the purchase-money into Court. A testamentary appointment was afterwards made by the tenant for life, and on her death the appointees petitioned for payment of the money out of Court. It

(1) 42 Ch. D. 250.

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became necessary to serve the petition upon the trustees of the marriage settlements of two of the appointees, and Mr. Justice *Kay* held that the company must pay the costs of the appearance of the trustees of those settlements. In the course of his judgment the learned Judge said that he thought the same principle would apply to the costs of a mortgagee whose mortgage had been created after the compulsory taking of the land. This is in accordance with the view of Vice-Chancellor *Wood*, in *Eden* v. *Thompson* (1), and of the Court of Appeal in *In re Bareham* (2). It is true that in *In re Gough's Trusts* (3) Vice-Chancellor *Bacon* refused to order a company which had taken land to pay the costs of proving mortgages afterwards made by the owners, but that decision is contrary to the current of authority.

Farwell, for one of the mortgagees, referred to *In re Nicholls' Trust Estates* (4).

[NORTH, J.:—You are entitled as a mortgagee to add your costs to your security. You have no interest in the question, unless your security is insufficient.]

Egerton Brydges, for the corporation:—

The corporation are not liable to pay more costs because the owners of the fund have chosen to incumber their interests in it. The intention of the Act was, that the persons interested in the property should be placed in the same position as if the purchase-money had not been paid into Court; not that they should gain an advantage by its being paid in. In *Eden* v. *Thompson*, and in *In re Brooshooft's Settlement* (5), there are only *dicta* as regards the costs of mortgagees. *Re Jones' Trust Estate* (6), and *In re Gough's Trusts*, are distinct authorities for not giving the mortgagees costs against the corporation.

At any rate, if the mortgagees are entitled to any costs from the corporation, their costs must be limited to two guineas: *In re Artizans' and Labourers' Dwellings Improvement Act* (7).

(1) 2 H. & M. 6, 9.
(2) 17 Ch. D. 329.
(3) 24 Ch. D. 569.
(4) W. N. 1866, p. 93.
(5) 42 Ch. D. 250.
(6) 18 W. R. 312.
(7) 14 Ch. D. 624.

Micklem, in reply:—

I admit that the costs of the mortgagees must be limited to two guineas for each.

NORTH, J.:—

In my opinion the mortgagees are entitled to have their costs paid by the corporation, notwithstanding the fact that the mortgages were created after the property had been taken by the corporation, and the purchase-money had been paid into Court. The property was settled on trust for a tenant for life and remaindermen, and while this state of things was existing the corporation took the property and paid the purchase-money into Court. After this had been done one of the reversioners mortgaged her interest in the fund in Court to a person who is a Respondent to the petition, and who now appears by counsel, and asks for his costs against the corporation. It is not suggested that there is anything vexatious in his appearing separately. It would be a very different matter if he had appeared by another solicitor merely for the purpose of obtaining costs. But in the present case the mortgagee's separate appearance is à *bonâ fide* appearance. In my opinion the case of *Eden* v. *Thompson* (1) is exactly in point. The facts, of course, are not the same as those of the present case, but the principle of the decision applies here. Vice-Chancellor *Page Wood* said (2): "The principle of the later cases is, that, if a suit has been instituted specifically dealing with the particular fund, then the petition, which is necessarily a petition in the suit, should be served like any other petition in the suit, and not merely as a petition under the Act; and the practice which has grown up has been to serve these petitions upon all parties to the suit. Then it is objected that a petition ought to have been presented, before suit, for payment of this fund out of Court, in which case it would have been simply a petition by the trustees for payment to them, and the only costs payable would have been theirs. But persons whose estates are taken by railway companies or other such bodies, under compulsory powers given to them for their own benefit, or the benefit of the parties whom they represent, are

(1) 2 H. & M. 6. (2) 2 H. & M. 8.

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entitled to deal with their estates to suit their own convenience, not that of the company; and if it happens in the course of such dealing that a suit is instituted, not being litigation, properly so called, but merely administration, or some similar proceeding under the direction of the Court, it will follow as of course that the company (except in cases of vexatious or wanton proceedings, of which the Court would take special notice, and with which it would know how to deal when they came before it) would have to pay the costs of all necessary parties, occasioned, not by any particular adverse claims, but by the ordinary course of dealing with property. This principle clearly covers the case of a mortgage, and would provide for the payment of all the ordinary costs of mortgagor and mortgagee, so long as there was no suit to set aside the mortgage, or other contest of that nature between the parties. The corporation, therefore, must pay all these costs."

The latter part of the passage which I have quoted deals with a case exactly like the present case, and, indeed, throughout the judgment the Vice-Chancellor is dealing with cases *in pari materiâ*—that is, with proceedings taken by the owners of the fund after it has been paid into Court. I need not refer at length to the judgment of the Court of Appeal in *In re Bareham* (1), in which the same principle is recognised. Again, in *In re Brooshooft's Settlement* (2), Mr. Justice *Kay* took the same view. It is true that he was not then dealing with the case of a mortgage, but with that of a settlement, but he pointed out the principle. He said (3): "I have been referred to certain cases in which a man has mortgaged his property, after the land had been taken, and the money paid into Court, and the Court has refused to give two sets of costs, viz., those of mortgagor and mortgagee. But it seems even there, there are decisions both ways. If I had to decide it myself, I should say again I do not see why the company ought not to pay the costs both of mortgagor and mortgagee. When they take a man's land compulsorily, they know there is always a chance of his dealing with it so as to increase the cost of getting the money paid out. I do

(1) 17 Ch. D. 329. (2) 42 Ch. D. 250.
(3) 42 Ch. D. 253.

not know why the compulsory action of the railway company should throw an increase of the costs on a man who did not part with his property willingly, but under the stress of the Act of Parliament."

There are other authorities to the same effect.

Two cases are relied on as being inconsistent with these authorities, and I think they are inconsistent. The first is a decision of Vice-Chancellor James, in *Re Jones' Trust Estate* (1), but it is so shortly reported that I am unable to understand the ground of the decision. The main question there appears to have been whether the company were liable to pay the costs of reinvestment in land, and there was a further question whether they ought to pay the costs of incumbrancers whose claim was subsequent to the payment into Court. Vice-Chancellor *James* held that the company must pay the costs of the reinvestment, but he said: "The company however is not liable to pay the costs of the mortgagees, but they will of course have them out of the fund." The case is not of such great authority as it would have been if the reasons of the Vice-Chancellor had been stated. There may have been some special circumstances which do not appear in the report. The other case is *In re Gough's Trusts.* (2) In that case a railway company had taken some settled land compulsorily during the subsistence of a tenancy for life, and, after the purchase money had been paid into Court, some of the persons entitled in remainder had mortgaged their reversionary interests in the money. After the death of the tenant for life a petition for payment of the money out was presented by the owners of the equity of redemption and their mortgagees. I do not understand the case, for according to the report the question was, not as to the costs of the petition, but as to the costs of proving the mortgages. I do not see how the money could have been paid out of Court without proof of the mortgages. The Vice-Chancellor said (3): "The company have nothing to do with costs as between mortgagor and mortgagee; I refer especially to cases of a mortgage made after the money has been paid into Court. The practice as laid down by the more recent authorities,

(1) 18 W. R. 312. (2) 24 Ch. D. 569.
(3) 24 Ch. D. 571.

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seems to be, that after the payment of purchase money into Court there is an end of liability on the part of the company to costs occasioned by dealings with the fund by the owners themselves." The "more recent authorities" to which the Vice-Chancellor there refers appear to be two text-books, but the decided cases do not, as it seems to me, bear out the statements contained in those books. Then the Vice-Chancellor continued: "The company must not be ordered to pay more than the Act of Parliament says they shall pay" (I quite assent to that), "and the costs which they are liable to pay are not to be increased by any adverse litigation, or by any subsequent matters of account as between the persons entitled." I find that s. 80 of the Lands Clauses Consolidation Act expressly excepts from the costs which are to be paid by the company which has taken the land costs "occasioned by litigation between adverse claimants," but there is no exception of costs occasioned by "any subsequent matters of account as between the persons entitled." I cannot regard that case as an authority binding upon me. Both the earlier and the later cases to which I have referred are inconsistent with it. I, therefore, hold that the mortgagees have been properly served with the petition, and that Mr. Farwell's client is entitled to have his costs from the corporation. But I think the corporation are right in saying that those costs must be limited to 42*s*. The corporation must also pay the costs of serving the mortgagee with the petition.

Micklem:—The same amount of costs should be allowed to the other mortgagee. It can make no difference that he appears by the same counsel as the petitioners.

NORTH, J.:—

I can give no direction as to his costs.

Solicitors: *Waterhouse, Winterbotham & Harrison*, agents for *Winterbothams & Gurney, Cheltenham; Mear & Fowler; Peacock & Goddard*, agents for *E. T. Brydges, Cheltenham.*

W. L. C.

FARRAR *v.* COOPER.

KEKEWICH, J.

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March 14.

[1890 F. 326.]

Arbitration—Partnership—Injunction—Jurisdiction.

The Court has jurisdiction to restrain a party from proceeding to arbitration, and will exercise that jurisdiction at the instance of one of the parties to the agreement for reference in a proper case, such as where it is satisfied that injury will result to the party complaining if the arbitration is allowed to proceed: but the Court will not exercise its jurisdiction where it sees the result of the arbitration will be merely futile and productive of no injury to the party complaining.

Articles of partnership between three partners, *A.*, *B.* and *C.*, provided that, as to any question in relation to the partnership, the decision of the majority should prevail; and further that, in case of any dispute between the partners, they should appoint three arbitrators, one to be appointed by each partner, and that the partners should abide by the award. Subsequently *A.* and *B.* gave *C.* notice of their appointment of two arbitrators, and requested him to appoint a third to decide disputes which they alleged had arisen between themselves, and *C.* *C.* denied the existence of any dispute requiring arbitration, and requested *A.* and *B.* to furnish him with particulars of the alleged disputes, which, however, they declined to do until *C.* had appointed his arbitrator, and they threatened that if he did not appoint his arbitrator they would proceed to arbitration before their own arbitrators.

On a motion by *C.* to restrain *A.* and *B.* from proceeding to arbitration:—

Held, that, as in *C.*'s absence any arbitration proceedings would be futile and in no way binding upon him, the Court ought not to grant an injunction.

By articles of partnership dated the 30th of June, 1887, and made between the Plaintiff *Benjamin Farrar* and the Defendants Messrs. *William* and *Henry Cooper*, who were brothers, the parties agreed to become partners in the business of stone, slate and general merchants for seven years.

The deed contained the following articles:—

"26. That in all cases of dispute on the method of business adopted by the said partners or one of them, or as to any question in relation to the said partnership, the decision and instructions of the majority or two members of the said partnership

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shall be final and effective, and be binding on the partner not assenting to or concurring in the said decision and instructions.

"27. That in case any dispute shall arise between the said partners, their executors or administrators, either during the continuance of the said partnership or after the determination thereof, either on the construction of these presents or the settlement of the books and accounts thereof, or the settling, dividing or applying the profits and losses of the said partnership, or any other matter, cause or thing relating to the same, then and in such case the said partners, their executors or administrators, shall forthwith nominate three disinterested persons, one of whom shall be chosen by each of the said partners, which said three persons shall determine all such matters aforesaid by their award in writing under their hands; and in case such referees cannot agree upon an award within thirty days next after such reference," then the same should be referred to an umpire; "and the said partners, their executors, administrators or assigns, shall and will abide by and perform the award which shall be made by the said referees or their said umpire without further suit or trouble whatsoever."

On the 10th of February the solicitor to the Defendants, *W.* and *H. Cooper*, wrote to the Plaintiff, *Farrar*, stating that in consequence of disputes between Messrs. *Cooper* and the Plaintiff, it had become impossible to continue the partnership and suggesting an amicable dissolution upon terms to be agreed upon. The Plaintiff's solicitors replied that he denied there was any dispute existing between himself and either of his partners, and that if there was any dispute it could be disposed of as provided by the articles.

Further correspondence then took place between the solicitors for the parties, but Messrs. *Cooper's* solicitors did not in any of their letters state what the matters in dispute were.

On the 22nd of February the Defendants' solicitor served the Plaintiff's solicitors with notices of the appointment by them of two arbitrators. The Plaintiff's solicitors having accepted service of the notices, on the 24th wrote stating that the Plaintiff knew of no difference with his partners, and again requesting to be informed what the disputes were. There being no reply to that

letter the Plaintiff's solicitors on the 25th of February wrote to the Defendants' solicitor that unless particulars of the alleged disputes were delivered within a certain time, the Plaintiff would take steps to prevent the intended arbitration proceeding. The same day the Defendants' solicitor replied that such particulars as the Plaintiff was entitled to would be given at the proper time; that if the Plaintiff did not appoint an arbitrator he must take the consequences; and that service of any proceedings the Plaintiff might think fit to institute would be accepted.

The Plaintiff then issued the writ in this action and now moved for an injunction to restrain the Defendants from proceeding with the arbitration finally, or until they had specified to the Plaintiff what disputes and differences had arisen which they desired to have settled by arbitration, or that the Plaintiff might be at liberty to revoke the submission to arbitration contained in the partnership deed.

In his affidavit in support of the motion the Plaintiff said he knew of no disputes or differences between himself and his partners or either of them; that his solicitors had over and over again asked for particulars of them, but without success; and that he believed that unless the Defendants were restrained by injunction they would proceed to arbitration, which would seriously prejudice him, as it would be perfectly useless for him to appoint an arbitrator on his behalf, or for him, the Plaintiff, to attend the arbitration, as he did not know what complaints would be alleged against him. The Defendants in their evidence complained of abusive and violent conduct on the part of the Plaintiff, and of his having occasioned serious losses to the firm through bringing it into unnecessary and improper litigation with customers; and they expressed their willingness to give him the fullest particulars of their case against him at the proper time, and also sufficient time to produce evidence to meet their complaints.

Marten, Q.C., and *Jason Smith*, for the Plaintiff.

Renshaw, Q.C., and *R. M. Bray*, for the Defendants:—

This motion is out of order. The arbitrators will themselves

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take care that the Plaintiff's case is not prejudiced, and the first step they will take in the arbitration will be to require particulars from the Defendants. The Court will not assume that the arbitrators will act unfairly or exceed their authority. Moreover, the Court has no jurisdiction to interfere with arbitration proceedings between parties who have entered into a formal agreement for reference, even though the proceedings may be futile: *North London Railway Company* v. *Great Northern Railway Company* (1). What the Plaintiff should have done was, as in that case, to have appointed an arbitrator under protest, then asked for particulars and refused to proceed further without them. If he found the arbitrators were proceeding improperly or unfairly he would be entitled to come to the Court for relief, but till then there can be no jurisdiction for the Court to interfere. The Plaintiff is bound by the terms of his contract, which says, in art. 26, that the decision of the majority of the parties shall prevail.

[KEKEWICH, J.:—I must hear you, Mr. *Marten*, in reply on the question of jurisdiction.]

Marten, in reply:—

The case cited on behalf of the Defendants is dealt with by the Court of Appeal in *London and Blackwall Railway Company* v. *Cross* (2), where Lord Justice *Lindley* says it is not an authority that in no case should a person be restrained from proceeding to arbitration, but that there are cases in which it is quite right to do so; and he cites *Maunsell* v. *Midland Great Western (Ireland) Railway Company* (3). In *Piercy* v. *Young* (4) it was held that the question whether the matters in dispute are within the agreement for arbitration is one which the Court will decide and not leave to the arbitrator. *Mylne* v. *Dickinson* (5), *Beddow* v. *Beddow* (6), and *Hedley* v. *Bates* (7) are also authorities shewing that the Court has jurisdiction to grant an injunction against pro-

(1) 11 Q. B. D. 30.
(2) 31 Ch. D. 354, 368.
(3) 1 H. & M. 130.
(4) 14 Ch. D. 200.
(5) Coop. G. 195.
(6) 9 Ch. D. 89.
(7) 13 Ch. D. 498.

ceeding to arbitration. [*Russell* on Arbitration (1), and sect. 12 of the *Arbitration Act*, 1889, were also referred to.]

KEKEWICH, J.:—

There is certainly no desire on my part to interfere with the domestic tribunal of arbitration in partnership cases; far from it. Many Judges have expressed their entire approval of the course often adopted by business men in referring matters to arbitration, especially when they are such as cannot be conveniently decided in open Court according to our procedure. Therefore, anything that I may say must not be construed as a wish to interfere with arbitration or the right of partners to resort to a domestic forum of their own selection. But it seems to me that the first principle of arbitration is that, having secured as arbitrators competent men, that is to say, men capable of doing their duty, and honestly intending to do their duty, the parties must lay before them those points which they have to decide; for unless those points are laid before them by all the parties concurrently, it is impossible for the arbitrators to decide any question between those parties.

At the present stage of this case I am extremely reluctant, not only to express, but even to indicate, any opinion as to the meaning of these clauses 26 and 27 of the partnership deed; but this is to be observed, that the clauses are wholly different in language, and as I understand them, wholly different in intent. Whether there is any dispute which has arisen within the meaning of the 26th clause is not now under consideration, though I gather from the affidavits that some, at any rate, of the parties think that there is. As regards the 27th, the words are not quite in the common form according to my experience, and they may require close consideration as to whether anything has yet occurred which comes within the meaning of that clause. That may be for determination hereafter. The Defendants have not condescended to tell the Plaintiff what they require to be referred to arbitration. They say in a rather curt manner, in their letter in reply of the 25th of February, 1890, "You appoint your arbitrator, and then we will tell you at the proper time what

(1) 6th Ed. p. 211.

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your arbitrator is to consider." It seems to me a practical as well as a legal answer to that is to say, "I want to know before appointing my arbitrator what he is to consider. My selection of an arbitrator will depend much upon the questions which are to be referred to him. For instance, if it is a question of the construction of the partnership articles, I should probably select a gentleman of the legal profession. If, on the other hand, it is a question of the settlement of accounts, I should probably select an accountant;" and so forth. The course which has been followed appears to me to put the Plaintiff in an extremely unfair position. If that is so, the only result of an arbitration conducted without the settlement of these particulars beforehand will be to produce an award which cannot be enforced, and which may give rise to a good deal of litigation, but cannot have any practical effect. Probably the very first question raised would be as to the enforcement of the award. Therefore, so far as I can foresee, there would be no arbitration—unless of course the Plaintiff came in and consented—which could be binding upon him or be really of any legal or practical value.

But does it follow that I ought to restrain the proceedings which the Defendants threaten? I entirely adopt what Lord Justice *Lindley* says in the case of the *London and Blackwall Railway Company* v. *Cross* (1), namely, that there are cases in which the Court will restrain parties from proceeding to arbitration, and Mr. *Marten* has cited other authorities to that effect; but the Lord Justice does not say, and I do not myself pretend to say, in what cases it is right to do so. I do not think the decision in the *North London Railway Company* v. *Great Northern Railway Company* (2) would prevent my doing so in a proper case, that is to say, in a case in which I saw that injustice or injury which ought not to be borne would result to the party complaining from the arbitration proceeding. But where I see that merely futile proceedings may result or that nothing to injure the Plaintiff is likely to result, I do not think that I ought to grant an injunction. There was a case of *Harper* v. *Paget* (3), before the late Master of the Rolls on motion in

(1) 31 Ch. D. 354, 368. (2) 11 Q. B. D. 30.
(3) Not reported.

February, 1876, in which I was engaged as counsel for the plaintiffs, and in which an application was made to Sir *George Jessel* to restrain directors of a company from holding a meeting and submitting resolutions interfering with the issue of some preferred shares in the company; but the Master of the Rolls refused the injunction, and expressed himself to this effect: "Why should I interfere? These directors, and such shareholders as support them, can pass such resolutions as they think fit. If you, the plaintiffs, are right, they have no authority to pass any resolutions binding upon you. Therefore the resolutions will be merely waste paper: I have no right to interfere with gentlemen meeting and passing futile resolutions if they so please:" I ought in this case to refuse an injunction on the same ground. I do not think that this arbitration, if it proceeded in the absence of the Plaintiff, or without the proper forms being observed, would have the slightest binding authority; I think it would be a futile proceeding. That being my opinion, I do not think I ought to grant any injunction. The Plaintiff having been provoked into coming here, the costs of the motion must be costs in the action.

Solicitors: *Wolferstan & Avery; H. Nield.*

G. I. F. C.

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FINCK *v.* LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

[1888 F. 90]

Railway Company—Statutory Powers—Limits of Deviation—Widening of existing Line—Medium filum—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 15 [*Revised Ed. Statutes, vol. ix. p.* 708]—*Excess of Statutory Powers—Special Damage.*

Section 15 of the *Railways Clauses Consolidation Act,* 1845, as to the distance to which a railway company may deviate from the line delineated on the parliamentary plans, and the decisions under that section to the effect that the distance is to be measured from the *medium filum viæ* of the line of railway actually laid down to that of the line delineated on the plans, apply only to the construction of a new line of railway, and not to the widening of an existing line.

By a special Act a railway company were authorized to widen their existing railway, and on the Parliamentary plans the existing line of railway was delineated, and there were dotted lines on either side indicating the limits of deviation. The company constructed a portion of their widening outside the limits shewn by one of the dotted lines and upon land taken by them from the Plaintiff, who brought this action against them for an injunction, but did not shew that he had sustained any special damage by reason of their acts.

The land of the Plaintiff taken by the company was comprised in the Parliamentary plans and books of reference. It consisted of two dwelling-houses and their curtilages. The company first gave notice to take such parts of them as were within the limits of deviation, but after receiving a notice from the tenants under the 92nd section of the *Lands Clauses Act,* requiring them to take the whole of the tenements, and also a letter from the landlord refusing to give up any part which he was not compelled to sell, they gave a fresh notice to take the remainder of the two tenements:—

Held, by *Kay,* J., upon the construction of the Act and reference to the plans, that the company were bound to construct their widening wholly within the limits of deviation, and had exceeded their powers in constructing it outside those limits:

But *held,* by *Kay,* J., and by the Court of Appeal, that assuming that the company had exceeded their powers in the construction of the widening, yet as the land taken was included in the Parliamentary plans and no special damage to the Plaintiff had been proved, the action could not be maintained:—

Held, also, that as the two houses and curtilages were included in the Parliamentary plans and were under the circumstances reasonably necessary to be taken for the completion of the company's works, the company

had the power to take them, although they were outside the limits of deviation, and that the notices were valid, notwithstanding the refusal of consent on the part of the landlord.

Dowling v. *Pontypool, Caerleon, and Newport Railway Company* (1) followed.

THE Plaintiff in this action by his statement of claim alleged in effect that the Defendants, the *London and South-Western Railway Company*, purporting to act under the *London and South-Western Railway Company (Various Powers) Act*, 1883, had given notice to the Plaintiff to treat for the purchase of certain pieces of land in *Blyth Terrace* and *Upper Marsh*, in the parish of *St. Mary, Lambeth*, belonging to the Plaintiff as trustee of a will, but which the company were not authorized to enter upon, take, use or compulsorily acquire; that against the will of the Plaintiff they entered upon the land and pulled down messuages thereon and built a viaduct on part of the land; and that they maintained such viaduct and claimed to be entitled in fee simple to the land upon which the viaduct was. Certain other wrongful acts on the part of the company were alleged.

By the company's special Act, which incorporated, amongst other Acts, the *Railways Clauses Consolidation Act*, 1845, it was recited that it was expedient that the company should be authorized, amongst other things, "to widen and improve the railways of the company hereinafter in that behalf mentioned in the county of *Surrey*." There was also a recital as follows:—"And whereas plans and sections of the railways and works authorized by this Act, the plans shewing also the lands required for the purposes of the said railways and works, and plans of the other or additional lands which may be compulsorily taken under the powers of this Act, and books of reference to such plans respectively, containing the names of the owners or lessees, or reputed owners or lessees, and of the occupiers of those lands respectively, were duly deposited." Section 5 was as follows:—"Subject to the provisions of this Act, the company may make and maintain the railways, deviations, improvements, and widenings of railways and other works described or mentioned in the four next following sections of this Act in the lines and in accordance with the

(1) Law Rep. 18 Eq. 714.

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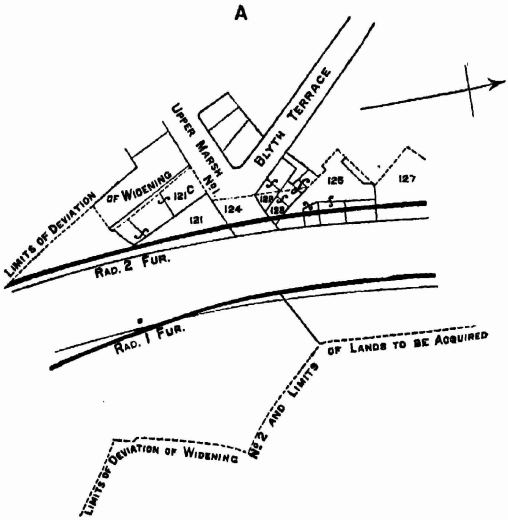
levels shewn on the deposited plans and sections . . . . and may enter upon, take, and use such of the lands shewn on the deposited plans and described in the deposited books of reference as may be required for those purposes." By sect. 8 the proposed widenings were thus described: "A widening (No. 1) in the parish of *St. Mary, Lambeth*, in the county of *Surrey*, of the company's railway on its western side between *Paradise Street* and the



north-eastern side of *Westminster Bridge Road*." "A widening (No. 2) wholly in the parish of *St. Mary, Lambeth*, of the company's railway on its eastern side between *Park Place* and the south-western side of *Westminster Bridge Road*." In the deposited plan the existing line of railway of the company was delineated and there was on either side of it a dotted line. The dotted line on the western side was described as "Limits of deviation of widening No. 1," and the dotted line on the eastern side was

described as "Limits of deviation of widening No. 2 and limits of land to be acquired."

The land taken by the company partly consisted of two houses with their respective curtilages numbered 122 and 123 on the deposited plans, both of which were held by tenants under leases from the Plaintiff. This land was situate on the western side of the existing railway, partly within and partly outside the limit indicated by the dotted line on that side. No. 122 was described as "house and shop," No. 123 as "dwelling house, shop, yard, and outbuildings."

The form of the deposited plan, and the position of the land taken, will be better understood by reference to plan A, which is a copy of a portion of the deposited plans. Plan B shews on a larger scale the mode in which the widening was carried out and the viaduct constructed, the dotted line being the "limits of deviation of widening No. 1."

It should be mentioned, in order to make the judgment of Mr. Justice *Kay* more intelligible, that on a part of the deposited plan not contained in plan A the dotted line on the eastern side receded from the existing line of railway to a considerable distance.

On the 31st of August, 1885, the company gave notice to take such parts of the two tenements as were within their limits of deviation, which included one of the houses and part of its curtilage and a part of the other house. The Plaintiff claimed £3000 as compensation for the loss of the property comprised in the notices, and damage to his other property, and gave notice to the company that he would not sell more than he was obliged to sell to the company under their compulsory powers. The tenants, however, required the company to take the whole of the two tenements under the 92nd section of the *Lands Clauses Act*, 1845.

On the 26th of January, 1886, the company served a second notice to treat, comprising the remainder of the two tenements, all of which was outside the company's limits of deviation.

After some correspondence, the company took possession of the two tenements under the 85th section of the *Lands Clauses Act*, and pulled down the two houses and built a viaduct to carry

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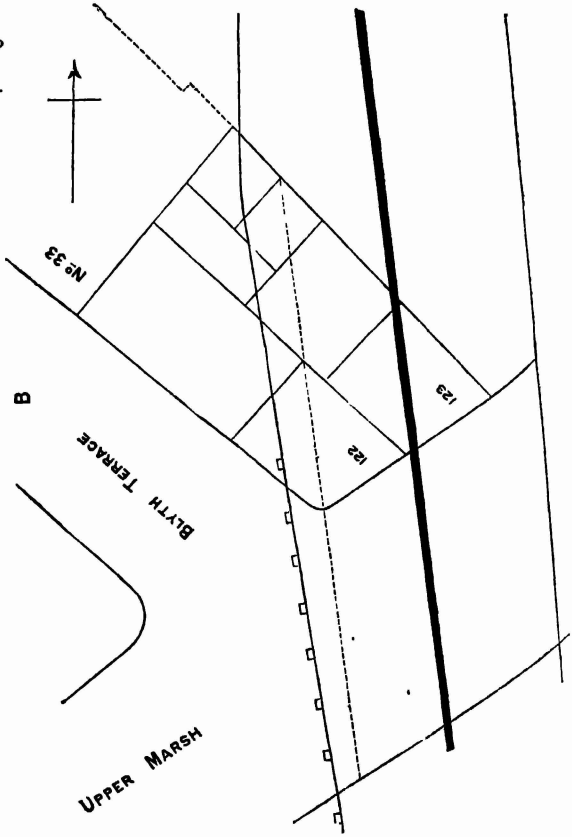
their new lines of rail, part of which was beyond their limits of deviation, and extended over without touching a small triangular



piece of roadway in *Blyth Terrace*, the soil of which belonged to the Plaintiff; the Plaintiff then brought the present action, in which he claimed to recover possession of the land taken by the

railway company, a declaration that the two notices to treat were invalid, and an injunction to restrain the company from stopping up a certain right of way.

It appeared that, although the widening of the railway of the company constructed over the Plaintiff's land extended beyond the limits shewn on the deposited plan by the dotted line, yet the centre line or *medium filum* of the additional railway so constructed in no part extended beyond those limits.

The action came on for hearing before Mr. Justice *Kay* on the 22nd of January, 1889.

Marten, Q.C., and *D. L. Alexander*, for the Plaintiff:—

The Defendants, the railway company, have exceeded their powers in taking this land, which was not included in their compulsory powers of acquisition. The company were only empowered to widen their existing line of railway, and not to construct a new line, and the case is therefore governed by different considerations from those which apply to a line constructed for the first time under Parliamentary powers. The dotted lines on the deposited plan shew the utmost limits to which the company may deviate, and they had no right to take land, still less construct their widening, as they have done, outside those limits. Section 15 of the *Railways Clauses Consolidation Act*, 1845, has no application to the case of a widening. Deviation in that section refers to transferring the entire line of railway from one place to another, and the cases which have been decided under that section establish only this, that in so transferring the line the distance may be measured from the proposed centre line or *medium filum* of the line of railway as shewn on the plan (usually by a dark line), and that the limits are not exceeded if the *medium filum* of the entire line of railway so transferred lies on the dotted line. But that is inapplicable to the case of a widening where the *medium filum* of the railway which is to be widened cannot be transferred. Moreover, sect. 15 of the *Railways Clauses Act*, allows in a country district a deviation to a distance 100 yards away from the *medium filum* shewn on the plan. That is clearly inapplicable to a widening. Such a deviation in the case of a widening converts it into a loop-line

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instead of a widening. The dotted line in this case is so irregular and jagged that it would be utterly impossible to adopt it as the *medium filum* of any line of railway.

Ince, Q.C., and *Vaughan Hawkins*, for the Defendants, the railway company:—

Sect. 15 of the *Railways Clauses Act* applies to this case. The expression "widening" is not altogether appropriate. The company were in fact authorized to construct additional lines of railway running approximately parallel to and by the side of the existing railway, branching from the existing railway and ultimately returning to it again. On the deposited plan there is one line, and only one which indicates the widening now in question, namely, the dotted line on the western side of the existing railway, and that line must be the *medium filum* of the additional railway which the company are authorized to construct on that side: *Doe* v. *North Staffordshire Railway Company* (1); *Doe* v. *Bristol and Exeter Railway Company* (2). The plan must be looked at to find, first, the line, and secondly, the limits within which the line may be shifted. The circumstance that the dotted line is irregular is not material, because that line is not intended as a line to be taken for the *medium filum* of the additional railway, but merely indicates an area beyond which the deviated *medium filum* may not be carried, and the only effect of the irregularity is that the outside of the area cannot be reached at all points.

The effect of sect. 15 of the *Railways Clauses Act*, is that it refers to the deposited plan for, and only for, the limits within which the railway to be constructed may be deviated. [They referred also to *Watkins* v. *Great Northern Railway Company* (3).]

Marten, in reply.

KAY, J.:—

The Plaintiff, a landowner, brings this action against the railway company, seeking to restrain them from dealing with a

(1) 16 Q. B. 526. (2) 6 M. & W. 320.
(3) 16 Q. B. 961.

certain part of his land in a way which he says will occasion damage to him. Several contentions have been raised from which I entirely dissent; and I will deal first of all with the principal one, which involves a question of very general importance in reference to the powers which the railway company have under their special Act. Their powers of dealing with land, which I have to consider, are powers for widening an existing railway.

The argument addressed to me has been this: Sect. 15 of the *Railways Clauses Act*, which is incorporated in the special Act, enables a railway company to deviate from the line of railway originally contemplated in the mode mentioned in the section, which I shall deal with presently. That has been decided to mean, that they may alter the direction of the railway, measuring the alteration from the centre line of the railway, and if the railway be in a country place, and there be no other limit fixed, they may, subject, of course, to such powers as they may have of obtaining the land on which to make it, deviate the centre line of the railway 100 yards from that laid down in the deposited plan. It has been argued, and at very considerable length, that this applies to the widening of an existing line, and that, accordingly, where a railway company take powers to widen their existing line, having no power whatever to remove the position of that existing line, they may, if no other limit is laid down, deviate the widening 100 yards away from the line originally proposed. Now one would have thought that sensible men like engineers would recoil before a conclusion which involves such nonsense as that. Can you, then, widen a railway 100 yards more than is indicated? Can you, instead of widening the line, make a loop-line 100 yards away? I should have thought it impossible for any sensible man to entertain that for a moment as being the meaning of that section. The truth is that these decisions on the section apply to the case of the original line of railway. Everybody who has had anything like the experience which these Courts have had knows now that the ordinary mode of laying down on a deposited plan the original line of railway is to make a dark line along what is proposed to be the centre of the railway, and then to make dotted lines outside which mark the limits of deviation, which limits of deviation are fixed; and the decisions

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as to the mode in which the deviation contemplated by the 15th section is to be made, refer to that original line of railway, and decide only this, that, in estimating the deviation, whatever be the extent to which you are empowered to deviate, you may measure from the middle line of the railway as actually laid down to the middle line of the railway in the original position. What on earth has that to do with widening? Now I turn to that section, and should have thought the case perfectly unarguable if it had not been argued. The section is in these terms: "It shall be lawful for the company to deviate from the line delineated on the plans so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans." That is one point. Where there are limits of deviation you cannot deviate beyond them "Nor to a greater extent in passing through a town, village, or lands continuously built upon than 10 yards"—that is to say, you may not make your limits of deviation further than that This is an absolute prohibition imposed by the general Act of Parliament. Then it goes on, "or elsewhere"—that is, if the land is not built upon—"to a greater extent than 100 yards from the said line." Then it goes on to say that, even though you may deviate so, you must observe what follows—"and that the railway by means of such deviation be not made to extend into the lands of any person, whether owner, lessee, or occupier, whose name is not mentioned in the books of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein or in the special Act provided for in cases of unintentional errors in the said books of reference." Take the simple case contemplated of a line in a country not built upon, where there are no limits of deviation fixed by the deposited plans and books of reference. You may take the line 100 yards away from where it was originally intended to go, but you cannot take the lands compulsorily 100 yards away unless they are set down in the books of reference. Unless you can get the land by agreement you have no power whatever to deviate your line in that way. That is the proviso contained in the section.

I have no doubt as to the meaning of the section, and never had for one moment all through this case. I have no doubt that it does not apply to this case in the way in which it has been contended it should apply.

What I have to deal with now is the meaning of this special Act which I have got before me, having regard to the plans and books of reference, and I proceed to inquire what is its meaning. [His Lordship then referred to the provisions of the company's special Act as above set forth, and proceeded as follows:—]

Now, what does widening the line mean? Widening the line means making the existing line wider than it is. The deposited plan on each side has a dotted line, which is called on the western side, "Limits of deviation of widening (No. 1)." That is the only name given to it on that side. On the other side it is called, "Limits of deviation of widening (No. 2) and limits of land to be acquired." Each of these dotted lines called "limits of deviation" is more or less, and very much in the part I have to consider, in a zigzag course. It goes out into very sharp angles. I instance one which is just at the corner of 121c, on the southern side of *Upper Marsh*, and another which goes to the corner of 127. These two jut out farther, it seems, than any other part of the angles of this line. But on the other side it is a great deal more remarkable, because the other side may be roughly described as forming a sort of triangle with the main line, and the widest part juts out to a width which looks to me roughly about five or six times the width of the main line, whereas in other parts it is not so much as the width of the main line.

Now, the argument which has been gravely urged is that the meaning of this Act of Parliament is that the widening may be made by placing the *medium filum* of the widening on this jagged line. Which part of this line are you to take as the *medium filum*? The whole of it? It would be impossible to make a railway if you took the whole of this as the *medium filum* of the widening. And, impossible and impracticable as that would be on the western side, it is more extravagantly absurd if you look at the eastern side. Therefore, the question really being what is the meaning of this particular Act of Parliament with this

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deposited plan, I am perfectly astounded that any one should think it worth while to contend for such a proposition.

Now, what does it mean? It is quite obvious what it means. If there was anything needed to make it more obvious, there is this. I observe on the western side there is a wide street called *Carlisle Street*, which runs, speaking roughly, in the same kind of line as the railway, but it approaches near to the railway, and there I see, "Proposed diversion of street." The proposed diversion is by continuing the street the same width as it is outside the limit of deviation. I do not know that anybody who has any common sense and desires to use it wants this additional illustration to shew the meaning of the Act. It is quite plain that the meaning is this; that land may be taken and used for the purpose of the railway up to the limit of deviation, and if it be, the street will have to be diverted; therefore, you will have to divert *Carlisle Street* outside the limit of deviation.

But another thing is this: the curve of this widening is given. It is given on the western side in one place, "Radius, 3 furlongs, 3 chains;" then, in another part, "1 furlong, 8 chains." And again, "Radius, 2 furlongs"; and on the eastern side it is, "Radius, 3 furlongs; radius, 2 furlongs; radius, 1 furlong." Now, what does that mean? That means the arc of the curve, striking from the centre, three furlongs away, would be part of that circle. Am I supposed to forget or to be ignorant that the general Act contains this section, sect. 14, "It shall not be lawful for the company to deviate"—observe the word "deviate"—"from or alter the gradients, curves, tunnels or other engineering works described in the said plan or section, except within the following limits"? Then, when I come to the limit, it is this: "It shall be lawful for the company to diminish the radius of any curve described in the said plan to any extent which shall leave a radius of not less than half-a-mile"—that is, four furlongs—"or to any further extent authorized" by the Board of Trade. So that these curves being all less than the radius of half-a-mile, it would not be possible to deviate from these curves in any way without the certificate of the Board of Trade. I am only piling up reasons against an argument which seems to me utterly untenable; but I am surprised, at this time of day, after the experience we

have all had in railway matters, that such arguments should be addressed to me at all. If the arguments of the company were to be admitted in this case, they would take the *medium filum* of this jagged line for their deviation, which, at the eastern side of the railway would take it away from the railway altogether, and then the curve would be altered by diminishing the radius of that curve at the eastern side of the railway enormously, which could not be done; the Board of Trade would never listen, I should suppose, to such diminution of the radius as would be involved in making the extreme point of the limit of deviation on the eastern side of the railway the *medium filum* of the widening.

Well, I will pursue it no further. It is an argument of despair, and it shews plainly that this company were inclined to do that which the Act of Parliament has not given them power to do. No expert on their part could for a moment believe that they had that power. There is no actual width of this line given. As I have said, the ordinary mode, when you are laying down in the deposited plan the line of the original railway, is to do that which I find illustrated at page 716 of the 18th volume of the Equity cases in *Dowling* v. *Pontypool, Caerleon and Newport Railway Company*, where there is a copy of the deposited plan, which I merely take for the purposes of illustration. It is a copy of an ordinary deposited plan of a railway. Roughly speaking, in about the middle there is a line drawn, and then there are dotted lines on either side of it at a certain distance, which shew the limits of deviation. When you are dealing with a widening, if the width of that widening is not actually defined the deposited plan contains a dark line like this, and then a dotted line shewing the limit of deviation outside that, and it must obviously mean this—you are to make your widening, that is, you are to make the railway wider on that side; the width is not specified, but the utmost extent to which you can go is shewn in every part of the dotted line; it is not the case that the dotted line is to be the *medium filum*. Now what this railway company have done is this: they have in this part which I have been dealing with made their railway beyond the dotted line; and I hold, without the least hesitation, that there is nothing

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in these Acts of Parliament which enabled them to do that; that is clearly in excess of their power. They must keep within the dotted line. I agree that they might make the widening to any extent which that dotted line enabled them to make it; but to go beyond that dotted line, and to make their railway beyond it, was an excess of their powers. Of that I have no doubt whatever.

But now the question is, can the Plaintiff complain? That is a very different matter. It is also perfectly well known that a particular landowner can only bring an action against a railway company in respect of their having exceeded their powers where that excess of power has done him special damage. I need not refer to cases upon a point so well settled as that. If the excess has done the landowner no special damage, then the complaint must be by the Attorney-General in the nature of an information. Has there then been by this, which I hold to be an excess of the powers of the company, special damage occasioned to the Plaintiff? That depends very much upon the question whether the land on which this extension of the Defendants' railway was made was land which the company were authorized to take.

It is as to part land which did belong to the Plaintiff. The land is part of the houses and curtilages on portions of which on the deposited plans are the figures Nos. 122 and 123. No. 123 is practically a house and buildings, and the curtilage of the house which is crossed by and not wholly contained within the limits of deviation. But the limits of deviation cross so as to cut off a small triangular piece. That is still more the case with No. 122. The limits of deviation cross that so as to leave the larger part of the messuage outside, and the figure No. 122 on the deposited plan is within the limits of deviation. It has been argued that only so much of Nos. 122 and 123 as is within the limits of deviation can be taken by the company. But Mr. *Ince* called my attention, very properly, I think, to the fact that on the deposited plan the boundaries of Nos. 122 and 123 are marked, and there are lines across Nos. 122 and 123, which lines are cut through by a figure like an *S*, and wherever you find that mark on a line, not merely on these deposited plans, but on deposited plans generally, and notably in the one referred to

in Law Rep. 18 Eq. 716, the meaning is that the line is not intended to be the boundary of the piece to be taken, but that the other pieces around its boundaries are also to be taken. The very same thing occurs in the deposited plan which I find in 18 Eq. p. 716. There is one of these marks like an *S* across a line which cuts through Nos. 7 and 6, shewing that that is not intended to be the boundary; and, again, in another plan, which is on the next page, and, indeed, in these very deposited plans which are before me in this case, this mark occurs again and again. I have no doubt that was the meaning of the little marks on Nos. 122 and 123; and the consequence is this, that on the deposited plan Nos. 122 and 123 extend to the whole of the respective plots which are surrounded by the lines of the plan and are not confined to the portions lying within the limits of deviation. That is made all the more clear if the book of reference is looked at. No. 122 is thus described: not "part of house and shop," but "house and shop"—that is, the whole. And, again, No. 123 is described as "dwelling-house, shop, yard, and outbuildings," comprising the whole of the tenement. I therefore have no doubt that the deposited plan and book of reference do include the whole of Nos. 122 and 123, which have been actually taken—that is, up to the building No. 33, *Blyth Terrace*, which is described as a greengrocer's shop. Then I look at the notice to treat which has been given. [His Lordship referred to the first notice to treat, and continued:—] It seems to me to comprise a portion of Nos. 122 and 123, and I gather that it went up to the limits of deviation. In the next notice to treat the rest of these two plots is included, so that the two notices to treat do completely cover the whole of the plots Nos. 122 and 123, as I understand the book of reference and the plan annexed to include them. Therefore, in my opinion the notices to treat were perfectly good, and the company had a right to take the whole of the land comprised in the two plots if it was necessary for their line (because of course all their rights are governed by that), although a portion of it was outside the limits of deviation. Now was it necessary? In the first place I have evidence to prove that the tenants of the houses required the company to take them; and, besides, it is plain that they were dwelling-

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houses or shops and the appurtenances, and it is almost impossible to conceive that if the company had tried to take part, the owner as well as the tenants would not have insisted that they should take the whole. But another reason was this: they must pull the houses down; the evidence before me is that they could not pull down parts of them. Therefore, there is another reason why it was necessary to take the whole. There is a third reason which belongs to another part of the case—that is, that for the purpose of making the substituted way it was proper and convenient that they should take it. Therefore those plots, 122 and 123, they had a right to take, and I am of opinion that it was necessary for them to take the whole of each of them, and that they acted within their power in doing so. Then, so far as the railway goes over that it is over their own land, and it does not do any harm to the Plaintiff, and he cannot sue in respect of it.

[His Lordship then referred to a claim of the Plaintiff which does not need a report, and also to the right of the Plaintiff to the right of way which had been stopped up by the company, and made a declaration that the railway company were bound under sect. 53 of the *Railways Clauses Act*, 1845, to maintain the way or passage which they had substituted in a state as convenient for passengers and horses as the way so interfered with. And his Lordship being of opinion that both parties were in the wrong gave no costs in the action.]

C. C. M. D.

C. A.

From this judgment the Plaintiff appealed. The appeal came on to be heard on the 3rd of March, 1890.

Marten, Q.C., *D. L. Alexander*, and *Montague Lush*, for the Appellant:—

Mr. Justice *Kay* decided in our favour that the company had no power to construct any part of their line beyond the limits of deviation sanctioned by the special Act, his Lordship being of opinion that the authorities by which it was decided that the limits of deviation referred to the *medium filum viæ* had no application to the widening of a railway already constructed. That being so, we contend that the Plaintiff is entitled to succeed on

several grounds. The Judge held, that although the act of the Defendants was illegal the Plaintiff could only maintain an action in respect of it if he had sustained special damage. But that is not necessary if the land has been illegally taken from him: *Watkins* v. *Great Northern Railway Company* (1). Here the Defendants have wrongfully taken the land. The notices to treat were invalid. The first notice included what the company believed to be within the limits of deviation, namely, one of the two houses, and part of its curtilage and part of the other house. Then the second notice included the rest of that house and of the two curtilages. This was all outside the limits of deviation, and could not be taken. Perhaps the company might have been compelled to take the whole of the two plots under the 92nd section of the *Lands Clauses Act*, if the landlord had required them to do so; but he refused to sell more than the company was entitled to take compulsorily, and the request of the tenants could not bind him: *Pulling* v. *London, Chatham and Dover Railway Company* (2). The company cannot say that the land comprised in the second notice was necessary for their works; if it had been they would have included it in their first notice. The second notice was only given in order to escape paying compensation for the land injuriously affected. But we contend, that whether necessary or not, the company had no power to take the lands because they were doing an illegal act, and not keeping within the powers of sect. 5 of their Act, which alone gave them authority to take land: *Little* v. *Newport, Abergavenny and Hereford Railway Company* (3). Moreover, the yard of one of the houses was not included at all in the books of reference or parliamentary plan. We also claim a restitution of a small triangular piece of land being part of the roadway in *Blyth Terrace*, over which the viaduct is made, and which is beyond the limits of deviation. Another cause of action is the Plaintiff's claim for a right of way as good as that which the company is taking from him. The substituted way which the Defendants have offered since the commencement of the action is wholly inadequate.

(1) 16 Q. B. 961. (2) 3 D. J. & S. 661. (3) 12 C. B. 752.

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Beale, Q.C., and *Vaughan Hawkins*, for the Defendants:—

There is no ground for the distinction which Mr. Justice *Kay* made between the limits of deviation in the case of the original railway and in the case of a widening of the railway. The *Railways Clauses Act*, 1845, s. 15, and the *Railways Clauses Act*, 1863, s. 8, which gives additional powers for making viaducts, make no such distinction. The limit of deviation referred to is the limit of deviation of the middle line of the road: *Doe* v. *North Staffordshire Railway Company* (1); *Doe* v. *Bristol and Exeter Railway Company* (2).

But if the company have exceeded their powers in building the viaduct beyond the limits of deviation, the Plaintiff cannot bring an action in respect of the act, unless he can shew that he has sustained special damage, and this he has not shewn. If the company were obliged to pull down the viaduct his position would be precisely the same as it is now. The company would still have the power to take the two plots of land numbered 122 and 123 and to stop up the right of way, on giving him a substituted way, because the land is necessary for their works, and is all included in the parliamentary plans and books of reference: *Dowling* v. *Pontypool, Caerleon, and Newport Railway Company* (3); *Wilkinson* v. *Hull, &c., Railway and Dock Company* (4). With respect to the notices to treat, the portion comprised in the first notice is admitted to have been necessary for the company's works, and that part could not be made use of without pulling down both the houses. Therefore, whether the landlord was or was not bound by the tenants' demand that the company should take the whole, it was reasonably necessary that they should do so; and whether they gave two notices, or one notice including the whole, was immaterial. With respect to the substituted way, we say that it is sufficient within the meaning of sect. 53 of the *Railways Clauses Act*, 1845, which says that the way must be as convenient as the road interfered with, "or as nearly as may be."

Marten, in reply.

(1) 16 Q. B. 526.
(2) 6 M. & W. 320.
(3) Law Rep. 18 Eq. 714.
(4) 20 Ch. D. 323.

COTTON, L.J.:—

This case is a complaint by a landowner against the railway company, that in proceeding under the Act which gave them power to widen their railway, they have exceeded their powers in various ways, and he claims to have re-conveyed to him some land which he says they took without any authority. I think the first point to be considered is this: whether the two notices to treat were, as he contends, illegal and inoperative. That is very much based on this, that the railway company have no right to take any land beyond the limits of deviation, and that they could not therefore take what they have taken. That really was the first and main point, and he carried it so far as to say, that they could not even take that which was contained in the first notice, which was a notice to take the parts of the houses nearest to the railway, and then he says, not being able to take that, *à fortiori*, they could not take the land which was comprised in the second notice. Now, I think that the railway company did not proceed exactly as they ought to have done, because, in my opinion, instead of giving the two notices, they ought to have given the notice once for all, including the whole of the property comprised in the two notices; but though they have not done so, yet, as they have now given notice, comprising the land contained in those two notices, I think we ought not to grant relief in this action on that ground. I do not enter into the question of what the limits of deviation may be as regards the extension, but whether the railway company had or had not confined their line within the limits of deviation, in my opinion, they were entitled to give notice to treat for the whole of the land comprised in those two notices. I think there is a good deal of difficulty as to the powers of the company to extend their line beyond the limits of deviation in a case like this; but there is no question that they may take lands beyond the limits of deviation if they are required for the purpose of constructing the works which they are authorized to make by the Act of Parliament, and, therefore, in my opinion, their power to take land is not limited to land within the limits of deviation; it is limited to land which is described in the books of reference and in the parliamentary plans.

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Now, what was done here? Here were two houses, 122 and 123 marked in the plan affixed to the notices. The company were entitled to take all of those plots if described in the book of reference and in the parliamentary plans for the purposes of work which they are authorized to construct. Then, that being so, are Nos. 122 and 123 described in the book of reference and in the parliamentary plan?

In the book of reference No. 122 is described as "house and shop." I do not agree with the contention that the small yard attached to that house and shop was not described in the book of reference, because No. 122 is only called "house and shop," and No. 123 is described more at large, and becomes "dwelling-house, shop, yard, and outbuildings." It cannot be that, merely because in No. 123 there is a more extensive reference, you are not to include this yard, which is clearly part of the house and shop. It is a little back yard which is used for some purpose, I know not what, connected with the house and shop, and I think that we ought not to hold that it is not comprised in the description of "house and shop." Then it is said that it is not in the parliamentary plan. I cannot agree with that either. Nos. 122 and 123 are both in the parliamentary plan; but it is said that the yard of No. 122 does not come within the description. Well, I think it does. The plan is very small, but I think the yard is laid down in it, though it is not connected with the other portions of No. 122 by the connecting "*S*," probably by some inaccuracy. In my opinion, that objection cannot prevail.

Then how have they shewn that this property is reasonably necessary for the purpose of constructing the railway? It is not necessary, in the sense that without it the railway could not have been constructed—that is not the meaning of it; but whatever is required reasonably for the purpose of enabling a railway company to construct their railway, in my opinion, is within the meaning of sect. 5 of the railway company's special Act, land, which they require for the purpose of constructing their railway. This first notice would have cut in halves part of one of those houses, and if the landlord and tenant had both been willing to enter into an arrangement to let the railway company pull down the whole, and then take back the bit of it, I think the railway

might have been reasonably made under the circumstances in that way. But then we find this: that the tenant said "No, you shall not do that; you must pull down the house and take the whole; I will not have the house cut in halves, and have only half a house." The landlord says, "I object to that; I will not sell an inch more ground than you can compulsorily take." Then, I think the railway company ought to have given a notice at once that they required to take the whole because they could not reasonably construct their railway when the tenant refused to enable them to take one part only, and therefore the landlord and tenant could not agree together as to what they would sell to the railway company. Not that the termor, as a rule, can bind the freeholder by a notice, under the 92nd section of the *Lands Clauses Act*, but that here, in consequence of the course which the parties took, it became reasonably necessary for the purpose of constructing the railway to take the whole of that which was comprised in both the notices. I do not doubt that what is said by the Lords Justices in *Pulling* v. *London, Chatham and Dover Railway Company* (1) is right as a general rule, but here, not because the landlord was bound by the option of his tenant, but by reason of the option of the tenant, it became reasonably necessary to take the whole, and it being reasonably necessary to take the whole, in my opinion, the railway company were entitled to give them notice to take, and to take, the whole. In consequence of the landlord's objection, they tried to see whether they could take only the actual portion which was comprised in the first notice. They were quite entitled to take the whole comprised in both notices,—if they had given one notice, as they ought to have done at first, they could have taken the whole. Then, in consequence of the claim made, which was established to be correct, as to the right of way to the stable, it became necessary, to enable the way to be made which they have made, to take another portion of that land which was comprised in the second notice, and I do not doubt that where, in consequence of its being necessary to make a substituted road, the railway company must take land which they would not otherwise have taken, they are entitled to do so. That is land required for the purpose

(1) 3 D. J. & S. 661.

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of constructing their works—that is for doing something which the construction of their works renders necessary.

Then we come to this point. The railway company were entitled to take all the land which they covered by their viaduct, though part of it is beyond the limits of deviation; and I will assume that there was a departure from the power given them by the Act of Parliament in making their viaduct; but then, as Mr. Justice *Kay* said, how is the Plaintiff injured by that? Unless he has sustained some special injury by their doing so, he individually cannot ask the Court to interfere. The Attorney-General might, on the ground of its affecting the public, appeal to the Court; but that is not this case; it is not suggested here that there is any injury to the public and the Attorney-General could not reasonably be put in motion; but I say, agreeing with Mr. Justice *Kay*, that there being no special injury to the Plaintiff in consequence of this departure from the authority given to the company by Parliament, he cannot ask the Court to interfere.

[His Lordship then considered the complaint by the Plaintiff as to the small triangular piece of land, beyond the limits of deviation, over which the Defendants had carried their viaduct. With respect to this, he said that he did not think the Plaintiff had received any appreciable damage, and continued:—]

Then there is only one other point and that is the substituted road. Has the Plaintiff shewn there is any substantial inconvenience by the substituted way? It is very true that till the action was brought, that substituted way was not given to him by the railway company, but it was given to him long before the trial of the action, and it was open still for the Plaintiff to bring forward evidence to shew how inconvenient (if it was so) this substituted way was. He has not done that. Mr. Justice *Kay* seems to have considered the case very fully, and was satisfied that the substituted way was quite as convenient as that which had been taken away from the Plaintiff, and I cannot differ from that. In my opinion, therefore, the appeal altogether fails.

LINDLEY, L.J.:—

This is a case of some nicety, and presents various features which are very seldom met with. I think the key to the whole

problem is to be found in the erroneous view adopted by the Plaintiff; and that erroneous view is this, that under no circumstances could the railway company justify taking land which was beyond the limits of deviation. That is at the root of the whole of this litigation; and that appears to me to be a mistake. The limit of deviation has reference to the line of rails, and if there are pieces of land outside the limit of deviation, but properly referred to in the book of reference and deposited plans, and if those pieces of land are *bonâ fide* wanted for the purpose of making the line within the limit of deviation, there is no authority I know of to shew that such pieces of land cannot be properly taken by the railway company. There was a doubt thrown upon this point by a case which came before Vice-Chancellor *Stuart*, of *Wrigley* v. *Lancashire and Yorkshire Railway Company* (1), which was referred to and examined with his usual care by Vice-Chancellor *Hall*, in *Dowling* v. *Pontypool, Caerleon and Newport Railway Company* (2). The report of the judgment of Vice-Chancellor *Stuart* (3) runs in this way: "It is evident that no part of the field which is now in dispute as described on the deposited plans of reference constituted one close. If so, the company have no power to take the land comprised in their notice." This is not very clear; but on turning to the *Jurist* (4), his meaning is intelligible enough. "It was very plain that no part of the field except that within the line of deviation was described in the deposited plans." That makes the judgment plain and intelligible. With this explanation, which Vice-Chancellor *Hall* had before him in *Dowling* v. *Pontypool, Caerleon and Newport Railway Company*, the doubt, which did exist, appears to me to disappear. That case is a clear authority, if authority is wanted, that if you have lands properly described in the books of reference and deposited plans, and they are *bonâ fide* wanted for the purpose of making the line within the limits of deviation, the company may take them; that is common sense, and in accordance with the Act.

It follows from the above remarks, that if the whole of the plots which are referred to as 122 and 123 were *bonâ fide* wanted

(1) 4 Giff. 352; 9 Jur. (N.S.) 710.
(2) Law Rep. 18 Eq. 714.
(3) 4 Giff. 360.
(4) 9 Jur. (N.S.) 711.

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for the purpose of making the line within the limits of deviation, they could be properly taken under those notices; and I am satisfied on the evidence that, under the very peculiar circumstances of the case—by which I mean that half the house was absolutely wanted, and that the other half must be pulled down or supported at an extravagant expense—which is utterly unreasonable—it is true in point of fact that in this case the whole of those plots were *bonâ fide* wanted for the purpose of making the line legitimately within the limits of deviation. This appears to me to carry the point in substance as regards those plots. It is to be regretted that the company did not give one notice to take the whole; if this had been done this controversy would never have arisen. Owing to reasons with which I am imperfectly acquainted, they first gave notice to take half, and then another to take the whole. I look upon that as nothing; the substance of the thing is: were they entitled to give notice to treat for this land? I think they were; and whatever the Plaintiff is entitled to under the compensation clauses he will get, if he has not got it already.

[His Lordship then referred to the complaint of the Plaintiff as to the small triangular piece of land, and said that the Plaintiff had suffered no damage on that account. He then considered the question of the substituted right of way, and continued:—]

It is competent to the railway company to take land for the purpose of making a substituted way. That has been decided in years gone by. The present way is in some places narrower than it was before, and it is said not to be so convenient as before; but if it is sufficiently wide for the purpose for which it exists—that is to say, to let a horse go to and from the stable—that would seem to satisfy the Plaintiff's right. There is no absolute right to seven feet all the way along; and when you look at the section of the Act of Parliament, it amounts to this: it is drawn in such a way that there is a certain latitude in giving the substituted way. It is to be "as convenient as the former, or as near as may be." The learned Judge has found as a fact that this is a sufficiently convenient way, and I see no reason to differ from him on that ground. It might have been straighter

or more convenient, but still it is a reasonable way, and as good as the company can give under the circumstances.

It appears to me, therefore, that upon the whole case the appeal ought to be dismissed, and dismissed with costs.

LOPES, L.J.:—

If the company had given a notice for what is contained in both notices in the first instance,—an entire notice, I mean, for the whole contained in the two notices—in my opinion, we should never have heard anything of this case. It could not have been then said that any land was taken without Parliamentary authority. If some is outside the limits of deviation, it appears to me that it is reasonably necessary for the purpose of the line, and of the line authorized by Parliament, and it is, moreover, properly described in the book of reference and in the Parliamentary plans.

Now, that being so, I do not feel inclined to assist the Plaintiff in consequence of this, which is no doubt a mistake on the part of the company, I mean a mistake in not giving a notice which comprised the whole of this land in the first instance, and I am the more unwilling to assist him because I feel that he is not substantially damaged. With regard to the bridge over the road, all I have to say about that is, that if any injury is caused to the Plaintiff, it is too insignificant to be taken into consideration. With regard to the substituted way, I agree with what has been said by Mr. Justice *Kay*. I think, that having regard to the purposes for which that way is required, it is sufficiently convenient and commodious; and I am very much struck by this, that the occupier was not called, nor was anybody else called, to say that it was not sufficient for the purposes for which it was required. Mr. *Marten* said that the reason of that was, that the way was given after action brought, and photographs were produced, and there was no necessity for giving any such evidence. I cannot help thinking myself that if this road had been in any way insufficient or not sufficiently convenient, the occupier or some other person would have been called to speak to the fact.

This is a very peculiar case, and it is peculiar in this way: It appears to me that both the Plaintiff and Defendants have mis-

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taken their rights. The Plaintiff took a wrong view when he contended that no land, in any circumstances, could be taken beyond the limits of deviation; the Defendants, on the other hand, took a wrong view when they contended that the *medium filum* of the widening was to be placed on the dotted line. I quite agree with what has been said by the other members of the Court, and I think that this appeal should be dismissed, and dismissed with costs.

Solicitors: *W. H. Withall & Co.; Bircham & Co.*

M. W.

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Building Society—Deed of Dissolution—Statutory Majority of Members—Withdrawing Member—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *s.* 32, *sub-s.* 3 [*Revised Ed. Statutes, vol. xvii., p.* 215].

The rules of a benefit building society provided that a member who had given notice of withdrawal should cease to take part in the affairs of the society:—

Held (affirming the decision of *North*, J.), that members who had given notice of withdrawal, but had not received their money, were still members of the society, and were to be taken into account in ascertaining the statutory majority of members required by the *Building Societies Act*, 1874, *s.* 32, to sign an instrument of dissolution.

In re Sheffield and South Yorkshire Permanent Building Society (1) explained.

THIS was an action for the purpose of setting aside an instrument of dissolution of the *East Dulwich 295th Starr Bowkett Building Society* as void, on the ground that it had not been signed by the requisite majority of members.

The society was incorporated under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42).

The following rules of the society were referred to in the course of the argument:—

Rule 2. "The object of the society shall be to make advances

(1) 22 Q. B. D. 470.

to members upon security of freehold, leasehold, and copyhold property by way of mortgage."

Rule 3. "The taking up or subscribing for one or more shares shall constitute membership, on payment of four weeks' subscriptions."

Rule 5. "The amount of each share shall be £100. A member may hold one or any number of shares; but in no case shall he hold more than four in a group."

Rule 6 regulated the amount of the subscriptions, which were payable weekly, and the fines for non-payments. The last clause was as follows: "Any member, not having executed a mortgage to the society, who may continue to neglect the payment of his subscriptions until the fines incurred and any other charges due are equal to the amount of subscriptions already paid by him, and notice of arrears shall be sent by the secretary, four weeks from the date thereof (unless previously paid), shall then cease to be a member, and forfeit all the moneys paid in respect of the shares."

Rule 18. "A member cannot receive back his subscriptions from the society until the expiration of five years from the date of the registration of the society, or if admitted after the above date, one year from taking his shares, cases of death excepted, as per rule 35.

"Members wishing to withdraw after the dates above shall then give three months' notice in writing to the secretary to receive back subscriptions standing to his credit, less all fines due and unpaid, and 1*s.* 3*d.* per share per annum for working expenses, charged from the commencement of the society. Withdrawals can only be paid from the repayments of appropriations. In the event of there not being sufficient funds in hand at the time a notice of withdrawal expires, the withdrawal shall be paid from subsequent repayments as received. Members holding one or more groups of shares may consolidate them by transferring the cash from shares standing to their credit so as to reduce their shares; not less than five years' working expenses from date of registration of the society shall be deducted, and for each subsequent year, and fines to date of consolidation; such subscription, when practicable, may be credited to appropriation account. In

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case of any loss to the society from whatever cause, the member withdrawing shall have deducted from his account a fair portion with other members, if such loss happens before his notice to withdraw has been received by the secretary.

"Subscriptions are reserved for making appropriations, paying expenses, and for purposes named in rules 11, 21, 30, and 31.

"All notices of withdrawal shall be preserved and entered by the secretary in the book for that purpose in the order they are received, and the withdrawing member be paid in the same order of rotation. The secretary shall inform the member in writing when the money is ready for him.

"Members being thirteen weeks in arrear (unless out of employment or sick), or having given notice of withdrawal, shall from the date of such notice cease to take part in the affairs of the society, but may cancel such notice at the discretion of the board of management. On the return of subscriptions, the withdrawing member shall cancel his pass-book and surrender it to the society."

Rule 30 provided for the termination of the society after the complete repayment of all appropriations or sums advanced to the members on their shares.

Rule 32. "The liabilities and assets of the society shall be valued twelve months prior to the closing of the society, under the direction of the board of management. The surplus profits, after providing for the cost of management, interest upon loans, and all the charges authorized by these rules, shall be rateably credited to each share not under notice to withdraw, and be payable after the last appropriation has been paid, as per rule 30. Profits made under this rule will be retained till all the payments, fines, and other charges have been paid to complete the last repayments due to the society, as per deed and rules, and within one month after the last repayment is completed the title-deeds shall be returned to the shareholder, when he shall cease to be a member unless he has some other shares in force."

Rule 33 regulated the calling of general meetings of the shareholders.

Rule 37 provided for the settlement by arbitration of disputes arising between any of the officers or any person or persons

claiming on account of any member or members and which cannot be satisfactorily settled by the board of management or a majority of members present at a general or special meeting.

The Plaintiff, *C. Sibun*, was the holder of twelve shares. On the 17th of September, 1886, he gave notice of his intention to withdraw from the society under rule 18. Several other members also gave notice of their intention to withdraw. At the date of the instrument of dissolution hereafter mentioned sixty-nine members had given notice of withdrawal, and the three months prescribed by the rule had expired in the case of all of them; but none of them had obtained a return of the subscriptions paid by them.

On the 14th of October, 1889, an instrument of dissolution was signed in pursuance of the provisions of the *Building Societies Act*, 1874, s. 32 (1), and was duly registered on the 24th of October. In this instrument the total number of members was stated to be 74, and the number of shares 247; but the amounts standing to the credit of the members in the books of the society was given as £3543 16*s.* 9*d.*, which included the money standing to the credit of the withdrawing members, and it was stated that the society owed creditors £1452 2*s.* 9*d.*, and that such sum would be paid out of the first moneys which should be received by the trustees of the committee of inspection.

(1) 37 & 38 Vict. c. 42, s. 32, so far as is material is as follows:—

"A society under this Act may terminate or be dissolved—

1. Upon the happening of any event declared by its rules to be the termination of the society.
2. By dissolution in manner prescribed by its rules.
3. By dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth—

(*a.*) The liabilities and assets of the society in detail;

(*b.*) The number of members, and the amount standing to their credit in the books of the society;

(*c.*) The claims of depositors and other creditors, and the provision to be made for their payment;

(*d.*) The intended appropriation or division of the funds and property of the society;

(*e.*) The names of one or more persons to be appointed trustees for the special purpose, and their remuneration."

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The Defendant, *W. H. Pearce*, was appointed trustee with certain powers.

Schedule A. to the instrument contained the names of the creditors, which list included the names of the Plaintiff and the other sixty-eight members who had given notice of withdrawal, together with the amounts due to them, but without referring to any shares which they had previously possessed.

Schedule B. contained only the names of the members, in all seventy-four, who had not given notice to withdraw, with the shares standing in their names and the amounts paid on each. Of these seventy-four members, fifty-seven signed the instrument of dissolution, and they possessed more than two-thirds of the shares. If, therefore, the members who had given notice of withdrawal were not to be reckoned, the instrument was duly signed within the provisions of the Act; but if they ought to be reckoned, the instrument was not signed by the statutory majority.

After some correspondence, the Plaintiff brought this action on behalf of himself and all other members of the society, except *Pearce*, against *Pearce* and the society, claiming a declaration that the instrument of the 13th of October, 1889, was void, and an injunction to restrain the Defendant *Pearce* from acting under the powers of the instrument or dealing with the assets of the society. The Plaintiff now moved for an *interim* injunction. The motion was heard before Mr. Justice *North* on the 7th of February, 1890.

Cozens-Hardy, Q.C., and *Farwell*, for the Plaintiff:—

The Plaintiff and those in a similar position have become members and have not ceased to be members, inasmuch as nothing has happened to sever their connection with the society. They are interested in the proper distribution of the assets and the winding-up of the company as well as the continuing members. They have a statutory right as members to be taken into account in estimating the number of assents to the deed of dissolution. Rule 18 treats the members who have given notice of withdrawal as members, no doubt restricting the part they are to take in the business of the society; but there is nothing in the rules to

interfere with the express enactment. It has been held that a member who has given notice of withdrawal is subject to the rules of his society in respect of arbitration, a dispute as to the amount he is entitled to recover being a dispute between the society and a member: *Walker* v. *General Mutual Building Society* (1); *Wright* v. *Deeley* (2).

Napier Higgins, Q.C., and *Bramwell Davis*, for the Defendants:—

We do not dispute that a withdrawing member is subject to and entitled to the benefit of the rules for some purposes; the amount to which he is entitled is in itself a creation of the rules. The question here is not whether the Plaintiff is a member for all purposes—we say that he is to some extent in the position of a creditor rather than that of an ordinary member; he has no interest in the affairs of the company more than a creditor has; his only interest is that the assets shall not be wasted, and shall be applied in due course until his claim is satisfied: *In re Sheffield and South Yorkshire Permanent Building Society* (3).

[NORTH, J.:—That case only applies to members who have been paid out.]

The rules provide in so many words that a member who has merely given notice to withdraw shall cease to take part in the affairs of the society. The taking part in the determination of whether there shall be a dissolution is taking part in the affairs of the society.

NORTH, J.:—

The first question is, whether the deed in this case is one which is binding upon all the members of the society under the 32nd section of the Act of 1874. That section provides that a society under the Act may terminate or be dissolved, first, upon the happening of any event declared by its rules to be its termination. That has not happened. "Secondly, by dissolution in

(1) 36 Ch. D. 777. (2) 4 H. & C. 209.
(3) 22 Q. B. D. 470.

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manner prescribed by the rules." That has not been attempted. Then, passing over the third, we come to the fourth, which provides another mode of winding-up, which it is not suggested has been done. Therefore the only question here is, whether the society has validly been dissolved under sub-sect. 3 of sect. 32. Now that provides that it may be dissolved "with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." Then it provides: "The instrument of dissolution shall set forth—(*a*) the liabilities and assets of the society in detail; (*b*) the number of members, and the amount standing to their credit in the books of the society; (*c*) the claims of depositors and other creditors, and the provision to be made for their payment; (*d*) the intended appropriation or division of the funds and property of the society; (*e*) the names of one or more persons to be appointed trustees for the special purpose, and their remuneration. Alterations in the instrument of dissolution may be made with the like consent, testified in the same manner. The instrument of dissolution and all alterations therein shall be registered in the manner provided for the registration of rules, and shall be binding upon all the members of the society."

Now a certain number of the members of the society have signed an instrument of dissolution purporting to be made under that sub-sect. 3, and to a considerable extent it conforms with its requirements; but the important point raised upon it is this, that the requisite consents have only been obtained if members who have given notice to withdraw their shares have ceased to be members. If, on the other hand, persons who have given such notice have not ceased to be members, but are still members, then it is admitted that the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society has not been obtained. The important question now, therefore, is whether *Sibun*, the Plaintiff, and other persons like him are or are not still members. *Sibun* is one of the persons whose consent has not been obtained.

For that purpose, we must look to the rules, to see when a person who beyond all question has become a member of the

society has ceased to be a member. Is it when he gives his notice to withdraw, or when that notice is complied with by his being paid off? What has happened in the present case is that the Plaintiff's notice of withdrawal was given in 1886, but he has not yet been paid.

The 18th rule is that which relates to the subject of the withdrawal of unappropriated shares. There is a good deal of the rule I need not read. I only read such parts as I think are material. "Members wishing to withdraw shall give three months' notice in writing to the secretary to receive back subscriptions standing to his credit, less all fines due and unpaid, and 1*s.* 3*d.* per share per annum for working expenses charged from the commencement of the society." "In the event of there not being sufficient funds in hand at the time a notice of withdrawal expires, the withdrawal shall be paid from subsequent repayments as received." Now, down to that point there is nothing saying that a person ceases to be a member upon giving notice to withdraw. *Primâ facie,* a three months' notice to withdraw means a notice to withdraw at the end of the three months for which the notice is required, and the repayment is only to take place at that time at the earliest; it may be postponed a little longer. "Members holding one or more groups of shares may consolidate them"—I do not think I need read that. Then we have this: "In case of any loss to the society from whatever cause, the member withdrawing shall have deducted from his account a fair portion with other members, if such loss happens before his notice to withdraw has been received by the secretary.

Now I have asked for the evidence to shew that the amount payable to Mr. *Sibun* has been ascertained, and although I pointed out the importance of reading evidence to me on that point, none has been read, and I assume none exists. I do not forget that in the deed certain sums are put opposite the claims of certain creditors. They are said to be the amounts of their claims; whether it be so or not I do not know. Then we come to this: "All notices of withdrawal shall be preserved and entered by the secretary in a book for that purpose in the order they are received, and the withdrawing member be paid in the

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same order of rotation. The secretary shall inform the member in writing when the money is ready for him." No doubt that might be explained by something clear and definite in the rule saying that in accordance with those rules a man shall cease to be a member at the date at which he gives the notice; but in my opinion, unless there is something to that effect, the withdrawal would date from the maturity of the notice at the earliest date, and not an earlier date, and these words, "shall inform the member in writing when the money is ready for him," are entirely inconsistent with the idea that the person to whom the notice in writing is given is a person who has ceased to be a member three months at least before the notice is sent to the person who here is described as being a member. Then there are these further words, "Members being thirteen weeks in arrears or having given notice of withdrawal shall, from the date of such notice, cease to take part in the affairs of the society." It seems to me that that would be absolutely unmeaning if the person could not—whether those words were there or not—take any part in the concerns of the society because he was not a member. It points to the diminution of the power of a man who is a member, giving him less power than he would have had if he had not given notice of withdrawal; but although it prevents his taking part in the affairs of the society, I see nothing there to shew that he is not a member—on the contrary, the existence of such a rule is only consistent with his being a member at the time. Then it goes on to say he "shall cease to take part in the affairs of the society, but may cancel such notice at the discretion of the board of management." I confess I do not understand what is meant by a man cancelling a notice at the discretion of the board of management. It may mean possibly that he may cancel it if they allow him to do so; but at any rate, it treats it thus, that the notice may be cancelled, and if the notice is cancelled the member is what he was before—he continues to be a member, and he is not a person who has ceased to be a member; in other words, cancellation of notice does not make him a member *de novo*, but it puts an end to the right to withdraw and to the obligation not to take part in the affairs of the society.

Now looking at that rule, which I am told is the only rule

bearing upon the subject, I have no doubt what its meaning is. These are long printed rules, and I have not myself had the opportunity of looking through them to see if there is anything else bearing upon this point. Neither of the counsel has called my attention to any such matter—therefore I assume there is not. Then it stands thus: under the rules Mr. *Sibun* has not ceased to be a member; though he has given notice of withdrawal, he has not been paid off, and he is still a member of the society; and I see nothing to prevent his coming within the class of persons referred to in the Act, where it says that the dissolution must be with the assent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society. He is a member, in my opinion, and he does hold a definite number of shares in the society—the number which he can resume the full enjoyment of by cancelling his notice of withdrawal; in other words, the number of shares which he had from the first. Therefore, as far as the section goes, I am of opinion that Mr. *Sibun* is a member of the society, and one whose consent it was essential should be procured. I do not find that the cases cited assist me very much. The general principles in *Wright* v. *Deeley* (1) and *Walker* v. *General Mutual Building Society* (2) apply; but the particular rules in those cases are different from the rules in the present case. In those cases it was clear that the rules did not make a man who had given a notice to withdraw cease to be a member. The question in the present case is whether the rules here had that result or not; but the observations of Lord Justice *Fry* in the case of *Walker* v. *General Mutual Building Society* (3) are not wanting in point when he says, speaking of the rule in that case: "Now, is this a dispute between the society and the plaintiff in his capacity of member? I have no hesitation in saying that in my judgment it is. His rights arise entirely from his membership, he is a withdrawing member, and till he has received payment it appears to me he remains a member. Rule 10 treats the person who has given notice as a member, and in my judgment rightly treats him as a member." Well, I see no difference in that respect in the

(1) 4 H. & C. 209. (2) 36 Ch. D. 777.
(3) 36 Ch. D. 786.

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rules of that society from the rules of the present, because I cannot hold that the direction that he should cease to take part in the affairs of the society is in any sense equivalent to a rule that he should cease to be a member when the notice is given.

Then the further case was referred to by Mr. *Higgins* and Mr. *Bramwell Davis* of *In re Sheffield and South Yorkshire Permanent Building Society* (1); but it seems to me to be a very long way from the present case, because in that case the question did not arise whether the person who had merely given notice to withdraw had ceased to be a member or not; but there rules provided for notice by an investing member, not to withdraw a share at all, but to withdraw the whole or any part of the amount due to him; the man had not only given his notice, but had been paid everything that was due to him, and the question was whether a person whose notice had been acted upon and the money paid was still a member. That was a different question from the one which arises in the present case.

[His Lordship decided other points raised in favour of the Plaintiff and granted an injunction.]

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From this decision the Defendants appealed. The appeal was heard on the 27th of March, 1890.

Napier Higgins, Q.C., and *Bramwell Davis*, for the Appellants:—

According to the true construction of the rules, shareholders who have given notice to withdraw cease to be members on giving notice. If Mr. Justice *North* is right in his construction of the rules, the society could not be dissolved at all; because the withdrawing members are precluded by rule 18 from taking any part in the affairs of the society, and therefore cannot sign the deed of dissolution. The three months' notice only refers to the payment of the money; the shareholder ceases to be a member at once. The provision in rule 18 forbidding the withdrawing members to take part in the affairs of the society was intended

(1) 22 Q. B. D. 470.

ex abundanti cautelâ for the operation of the notice is sufficient in itself to preclude them from so doing. The position of shareholders in an ordinary company has no analogy to the position of the members of a building society, because they cannot give up their shares and so escape liability; but here they have a right to do so: *In re Blackburn and District Benefit Building Society* (1); *In re Sheffield and South Yorkshire Permanent Building Society* (2); *Walton* v. *Edge* (3); *Auld* v. *Glasgow Working Men's Building Society* (4). [They also referred to rules 3, 6, 8, 18, 32, and 33 of the society's rules.]

Farwell (*Cozens-Hardy*, Q.C., with him) for the Respondent:—

The withdrawing members do not cease to be members when they give notice of withdrawal. They remain members till they have been paid off, and if there were any dispute about the amount due to them they would have to go to arbitration under rule 37: *Walker* v. *General Mutual Building Society* (5), and *Wright* v. *Deeley* (6) are in our favour. The expressions used in *In re Sheffield and South Yorkshire Permanent Building Society* respecting the effect of a notice of withdrawal have reference to the facts of that case, where the withdrawing members had been paid off. The provision in rule 18 forbidding those who have given notice to take any further part in the affairs of the society would be useless if they ceased at once to be members. It shews that for some purposes at least they continued to be members.

Bramwell Davis, in reply.

COTTON, L.J.:—

In this case an injunction has been granted to restrain the society from acting on a deed of dissolution. Under the Act of 1874, sect. 32, there can be a dissolution with "consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society"; and that is to be done in a

(1) 24 Ch. D. 421.
(2) 22 Q. B. D. 470.
(3) 10 App. Cas. 33.
(4) 12 App. Cas. 197.
(5) 36 Ch. D. 777.
(6) 4 H. & C. 209.

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particular way—it is to be "testified by their signatures to the instrument of dissolution." Then we come to what the deed of dissolution is to set forth—"(*a*) the liabilities and assets of the society in detail; (*b*) the number of members, and the amount standing to their credit in the books of the society; (*c*) the claims of depositors and other creditors, and the provision to be made for their payment; (*d*) the intended appropriation or division of the funds and property of the society; (*e*) the names of one or more persons to be appointed trustees."

Mr. *Higgins* opened this case by saying, that if those who have given notice of withdrawal are still to be considered as members for the consideration of this section, then the injunction is right, and if not then it is wrong; and what he contended was this, that there had been in the year 1886 sixty-nine persons, who were then undoubtedly members of the society, who had given notice of withdrawal, seventy-four who had not, and nothing has yet been paid to those members who have given notice of withdrawal. We must, therefore, look and see what there is in the Act or rules to enable us to determine whether these are to be considered as members of the society. I will first consider what provision there is in the rules, so as to find out how the position of membership is to be maintained and what is to be done by members. Sect. 6 of the rules provides for certain things being done by a member, and then it says that any member, not having executed a mortgage to the society, who may continue to neglect the payment of his subscriptions until the fines incurred and any other charges due are equal to the amount of subscriptions already paid by him, is to be expelled; then he "shall cease to be a member." I notice that, not because it is the rule on which this question turns, for this turns on the withdrawal rule, which is rule 18, but I refer to it for this purpose, that it is the rule which definitely states when the contract of membership is to be put an end to, and then it says in a certain event he shall cease to be a member.

Then, is there anything like that in rule 18, which is the rule relating to withdrawal? There are certain provisions that the member cannot receive back his subscriptions until the expiration of five years; then he is to give three months' notice in

writing to the secretary to receive back subscriptions standing to his credit after that time. I do not discuss the question whether his status is affected immediately upon his giving the notice of withdrawal, or whether it is at the end of the three months, because I do not quite see how it is material. Then we have this, "All notices of withdrawal shall be preserved and entered by the secretary in the book for that purpose in the order they are received, and the withdrawing member be paid in the same order of rotation. The secretary shall inform the member in writing when the money is ready for him." A good deal of reliance has been placed, and I think rightly, upon this, that when the member gives the notice of withdrawal, and even when the three months have expired, he is still a member. He is, as a member, to receive his money in rotation, and he is, as a member, to be informed by the secretary when the money is ready for him. Then we come to this—which has also been very much relied upon—"Members being thirteen weeks in arrear (unless out of employment or sick) or having given notice of withdrawal shall, from the date of such notice, cease to take part in the affairs of the society." But with respect to those persons who are in arrear, where a member is thirteen weeks in arrear, then, though there has been no expulsion and no forfeiture of his shares, he ceases to take any part in the affairs of the society; because, of course, if he were expelled, or his shares were forfeited, it would not be necessary to say that he shall no longer "take part in the affairs of the society." The same rule applies to those who have given notice of withdrawal, that they are not to take further part in the affairs of the society; and it has been said that this means that they are no longer continuing members. I say, No; it is necessary that they shall continue members; and this rule is not inconsistent with their doing so. Then it is said that if they continue members, this rule, which prevents them from taking part in the affairs of the society, prevents them from signing this deed, and, therefore, prevents the necessary majority being obtained. But, in my opinion, that is not the meaning, because to say, "not take part in the affairs of the society" must mean "not take part in the affairs of the society as a continuing business"; it will not prevent them doing

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that which, in my view, the Act of Parliament requires them to do, if they accede to the dissolution, to shew their assent by signing this deed. That, in my opinion, is not "taking part in the affairs of the society" within the fair meaning of this rule but doing something which the Act of Parliament requires to be done in order to get the dissolution in the event which has happened. Members who are thirteen weeks in arrear, or who have given notice of withdrawal, are not to take part in the affairs of the society in this sense, that they shall not have any voice as to how the affairs are to be conducted if it is a going concern; but, in my opinion, it is very reasonable that they should have a voice as to whether a dissolution shall take place in the particular way provided by this particular deed.

Then we come to this: are they persons who are excluded from the members whose assent is required by the 32nd section? It is said that must be so, because this section means they must be members who have the full rights as such members. In my opinion, there is nothing of that sort here. If these persons who give notice of withdrawal are restricted from taking part in the affairs of the society in the sense I have mentioned, that is very reasonable; but they are still members; and although it is said they cannot then be said to be holding shares in the society, I cannot accede to that. Cannot a person still hold shares, and yet be in such a position as to be prevented from interfering in the affairs of the society as a going concern? In my opinion, he does still hold his shares, and the fact of his holding shares necessarily involves that he shall be entitled to exercise all the rights in respect of those shares which he is not prevented from exercising by the rules of the society.

Then, why should we give a different construction to "members" in this portion of the rules from that which we are to give to "members" in sub-sect. 3 of the 32nd section of the Act of 1874? The instrument of dissolution, rightly, I think, gives the sum standing to the credit not only of the members who have given no notice of withdrawal, but also standing to the credit of those who have given notice of withdrawal. Under sub-division (*b*) of sub-sect. 3 the deed is to state "the number of members, and the amount standing to their credit." In my

opinion, they must take into account what is required under sub-division (*b*).

Then it is said the cases are against it; but the only case on which I think the Appellants can in any way rely, is that case of *In re Sheffield and South Yorkshire Permanent Building Society* (1), and there the decision is nowhere in favour of the Appellants, because the decision is on an entirely different point. The county court judge had held that certain members who had given notice of withdrawal, and had been paid the full amount which was standing to their credit, were not liable, and properly so; but then, as regards certain other members who had withdrawn before their shares had matured, and before the amount which they had to pay was fully paid, the county court judge held that under sect. 14 of the Act of 1874 they were liable in the winding-up for the amount unpaid on their shares. What was relied upon were certain expressions used by the Judges in giving judgment. I have had the opportunity of reading through the judgments, and I asked Mr. *Farwell* to explain them, and I understand the explanation he gives is, that those expressions are expressions applicable to those who have given notice of withdrawal, and who are to be paid off as soon as there are funds necessary for the purpose, which payment, when made, severed entirely their connection with the society. I think that is the fair meaning of what is said by Mr. Justice *Cave* in his judgment at p. 475.

In my opinion, therefore, the decision under appeal was right.

LINDLEY, L.J.:—

I have no doubt the decision is right. The question turns upon the construction of an Act of Parliament which is less obscure than usual.

Now, first of all, I will refer to this instrument of dissolution.

I cannot myself obtain much light from that document, because it is plain to me that the word "members" there is used sometimes in one sense and sometimes in another. When they talk of the "number of members" they exclude the withdrawing members; when they talk about "the amount standing to the

(1) 22 Q. B. D. 470.

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credit of members," they include the withdrawing members. I pass that by as not consistent. I do not think that this instrument helps either side.

Now, as regards the rules, the rules are made pursuant to the *Building Societies Act* of 1874, and by sect. 16 of that Act, clause 4, the rules are to regulate "the terms upon which shares may be withdrawn and upon which mortgages may be redeemed," and by clause 14, "the manner in which the society, whether terminating or permanent, shall be terminated or dissolved."

Pursuant to that enactment we have rules of this society; and first, the question is, What is the meaning of the word "members" in this rule or this set of rules? The Act of Parliament contains no interpretation of the word "member," and leaves that to be ascertained from the rules themselves. The rules which are important with reference to that are those which have been referred to, beginning with rule 3: "The taking up or subscribing for one or more shares shall constitute membership on payment of four weeks' subscriptions," and so on. Then there is the rule relating to subscriptions with the forfeiture clause which has been referred to. Then we come to the withdrawal clause, rule 18, which is important; and the question turns really upon the true construction of this rule taken in connection with the Act of Parliament. You may construe a rule by reference to the Act of Parliament, but you can hardly construe an Act of Parliament by reference to a rule; and if rule 18 does conflict with the Act of Parliament so much the worse for the rule, not so much the worse for the Act of Parliament. But I do not think there is any conflict. What the rule says is this. Having described "members," and said that members wishing to withdraw after certain dates shall give three months' notice to the secretary to receive back the subscriptions standing to their credit, the rule says, "Notice of withdrawal shall be preserved and entered by the secretary in a book"; and then it says, "The secretary shall inform the member in writing when the money is ready for him"; treating, therefore, the person who has given notice, and who is entered in the book, as a member. Then it says, "Members being thirteen weeks in arrear, or having given notice of

withdrawal, shall from the date of such notice cease to take part in the affairs of the society, but may cancel such notice at the discretion of the board of management." Now, what is the position of a member who has given notice of withdrawal, but who has not been paid back the amount due to him for his subscriptions? Some say he is a member; some say he is a creditor. The true mode of describing him is to describe him as a member who has given notice of withdrawal, and is entitled to payment. That he is not an ordinary creditor is plain. He cannot come into competition with outside creditors. On the other hand, as between himself and the continuing members, he is entitled to be paid the amount due to him before they can divide the assets. In that sense he is a creditor; and that was decided in *In re Blackburn and District Benefit Building Society* (1), which afterwards went to the House of Lords.

But does he cease to be a member before he is got rid of under these rules? It seems to me he does not. He is not to take part in the affairs of the society; neither is a person who is thirteen weeks in arrear to take part in the affairs of the society; but he does not cease to be a member until he is got rid of, neither does the person who withdraws. The words, "he shall not take part in the affairs of the society," mean that he shall not take part in the affairs of the society as a going concern. If these words mean more, they are in conflict with the Act of Parliament, which I will read presently. I do not think these words mean more on a fair construction of these rules; but if they do, the Act of Parliament must prevail over them.

Now, what does the Act of Parliament say? The Act of Parliament says, in sect. 32: "A society under this Act may terminate or be dissolved" (among other ways) "by dissolution with the consent of three-fourths of the members, holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution."

Then has this deed or instrument of dissolution been consented to in compliance with this Act of Parliament—that is to say, has it been consented to by three-fourths of the members holding two-thirds of the shares? The answer is, "Certainly not." It

(1) 24 Ch. D. 421.

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is contended that those persons who have given notice of withdrawal have ceased to be members. For the reasons I have given, I cannot come to that conclusion.

But it has been said, it has been decided that they are no longer members, and reference was made to the case of *In re Sheffield and South Yorkshire Permanent Building Society* (1). It is quite obvious when you look at the Act and the rules which the Court had to deal with there, that a man who had given notice of withdrawal, even if he had not been paid out, was not liable to contribute anything under the rules of that society. Sect. 14 makes that plain; that sect. 14 runs thus: "The liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear." His liability is to be limited to the amount paid. That does not mean that calls are to be made upon him to the extent of the amount which he has paid; that would be making him pay twice over. It means what he has paid, and what he is liable to pay. Then if he is in arrear—that is to say, if there is more coming due from him to the society—that excess may be called up and contributed to. Now, nothing can be due from him, after his notice of withdrawal, whether he has received his money out or not; he has nothing more to contribute. Therefore, it is perfectly plain that the decision in the *Sheffield* case was right.

But there are some expressions in that case which look as if the Court treated members who have given notice of withdrawal as no longer members of the society. That is to be explained by the circumstance that, in that particular case, the members there had been paid out, and therefore they had ceased to be members of the society. They had nothing whatever to do with it. That is the explanation of those expressions, which at first sight appeared to be more or less in Mr. *Higgins's* favour; not that the decision was in his favour: it has nothing to do with this case one way or the other.

The only other case which is at all important is *Walker* v. *General Mutual Building Society* (2), which, so far as it goes, is in accordance with the view which we are now taking of the Act

(1) 22 Q. B. D. 470. (2) 36 Ch. D. 777.

—that is to say, that a member who has given notice of withdrawal, but is not paid out, is still a member.

For these reasons I am of opinion that the judgment of the Court below must be affirmed, and this appeal must be dismissed.

LOPES, L.J.:—

The question is, whether the Plaintiff and certain other persons who are withdrawing members, are "members" within sect. 32 of the *Building Societies Act* of 1874, and whether they are members for the purpose of the dissolution of this society.

Now, if the withdrawing members are "members," the deed is bad; but if they are not, the deed is good. The question depended upon sect. 32, to which I have alluded, and the rules of the society. I do not propose again to read sect. 32. I think that the withdrawing members are members of the society; and it is to be observed that sect. 32 uses the word "members" without any qualification, "by dissolution with the consent of three-fourths of the members"; and I cannot see where Mr. *Bramwell Davis* got the meaning that he sought to put upon it, namely, members who had the rights of shareholders. The word "members" is used without any qualification.

Now I come to rule 18, which is the important rule amongst the rules in question. Again, I do not propose to read that rule; but I think that the different portions of it, to some of which I alluded in the course of the argument, lead only to one conclusion, and that is, that what was intended was that the withdrawing members should continue to be members until paid up. I read the expressions in that rule as being irreconcilable with any other construction.

There is a portion of the rule which is relied upon by Mr. *Napier Higgins* with regard to the fact that the withdrawing members should cease to take part in the affairs of the society. It appears to me that that is not an expression upon which he is entitled to rely. That expression recognises the fact that they are still to be members; it is true that they are not to take interest in the affairs of the company as a going concern, but still they are to be members, and to be members for the purpose of the dissolution of the society. Rule 6 also is a rule worthy of

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attention, because it makes it clear that, where it was intended that a member should cease to be a member, the apt and explicit term was used, that he should "cease to be a member."

The case relied upon by Mr. *Napier Higgins* was *In re Sheffield and South Yorkshire Permanent Building Society* (1); but, as has been pointed out, that case is clearly distinguishable from the present, because the withdrawing members had been paid out. In point of fact, that case appears to me to be rather an authority in favour of the contention of the Respondents; they had been paid out, and had ceased to be members. I think, therefore, that this appeal fails.

Solicitors for Plaintiff: *Savery & Stevens.*
Solicitors for Defendants: *Crawford & Chester.*

M. W.

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[1888 V. 774.]

Parties—Patent—Mortgage—Assignment—Patent Office—Registration of Deed—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57) *s.* 87—*Rules of Supreme Court,* 1883, *Order* XVI., *r.* 11.

V., the registered assignee of a patent, mortgaged it, and the mortgagee was registered "as mortgagee." After this, *V.* sued an infringer without making the mortgagee a party. The Defendant pleaded that *V.* was not the proprietor and could not sue. The mortgagee declined to be made a co-Plaintiff, and was not added as Defendant. *Kekewich*, J., dismissed the action on that ground, without going into the merits:—

Held, on appeal, that as the mortgagee was not registered as assignee or proprietor, sect. 87 of the *Patents, Designs, and Trade Marks Act*, 1883, did not apply, and the case must be decided according to the general law as to mortgages, and that *V.* could sue without making the mortgagee a co-Plaintiff.

Semble, that even if the mortgagee had been registered as assignee or proprietor, sect. 87 would not be read as taking away the mortgagor's right to sue for infringement of the patent.

Held, that, if it had been necessary to have the mortgagee before the Court, it would not have been right to dismiss the action on the ground of

(1) 22 Q. B. D. 470.

his absence, but the Court ought to have made him a party under Order XVI., r. 11.

But, *held*, that it was not necessary at present to have him before the Court, and the order of *Kekewich*, J., was discharged, without prejudice to any application by the Defendant to have the mortgagee made a party, if circumstances should arise making it necessary.

THE Plaintiffs in this case were the assignees, under deeds dated the 1st of October, 1885, and 30th of December, 1885, of letters patent granted to *Peter Van Gelder* for improvements in apparatus for separating substances by means of sieves, and were duly registered as assignees; and this action was brought in 1888 claiming an injunction and damages for infringement.

The Defendants in their defence said: "1. The Plaintiffs are not the proprietors of the patent and are not entitled to sue in respect thereof." The Defendants also denied that they had infringed, and alleged several objections to the validity of the patent.

It appeared that by an indenture of mortgage dated the 31st of December, 1885, made between the Plaintiffs of the one part, and the *Halifax Joint Stock Banking Company* of the other part, after reciting the grant of divers letters patent, including the letters patent to which this action related, and reciting the subsequent dealings with them, it was witnessed that the Plaintiffs, as beneficial owners, assigned to the banking company all the said inventions and letters patent and all the benefits and privileges arising out of or to be derived therefrom, to hold the same unto the banking company, subject to a proviso for redemption on payment to the banking company of the balance due to them from the Plaintiffs on their account current. And it was declared that, subject as thereinafter mentioned, it should be lawful for the banking company, without any consent on the part of the Plaintiffs, to grant such general or special or other licenses to use the premises assigned, for such term on such conditions and in such manner as the banking company should think fit; and also to sell the same in the manner therein mentioned. Provided always that the power of granting licenses and of selling should not be exercised unless default should be made in payment of the money due to the banking company for two calendar months after the account current had been closed, or

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after a notice demanding payment should have been given or left as therein mentioned. There was a clause exempting purchasers and licensees from seeing to default.

This mortgage was duly registered in the Patent Office. One of the officers was called to give information, and stated that the practice in the office since the Act of 1883 was to register an assignee by way of mortgage as "mortgagee" not as "assignee" or "proprietor." The entry in this case was made on the 22nd of February, 1886, and was as follows: "By request received and filed. *Halifax Joint Stock Banking Company, Limited, Princes Street, Halifax, York,* registered as mortgagees. Mortgage, *Van Gelder, Apsimon & Co. Limited* to the *Halifax Joint Stock Banking Company, Limited,* produced, and copy thereof filed." An examined copy of the mortgage deed was at the same time filed.

Subsequently the Plaintiffs had given other mortgages. None of the mortgagees ever interfered with the working of the patent by the Plaintiffs.

The action came on for trial before *Kekewich,* J., on the 16th of January, 1890, and after it had been opened at some length, Sir *R. Webster,* A.G., called attention to the fact that the Plaintiffs had assigned the patent by way of mortgage, and that the Defendants contended that on that ground they could not sue.

Aston, Q.C., *Bousfield,* and *Neill,* for the Plaintiffs:—

Though we have assigned the patent we have still a great interest in it, and can at all events maintain an action for an injunction just as a mortgagor can maintain an action for trespass (sect. 87 of 46 & 47 Vict. c. 57): *Lawson* on Patents (1). On the register the transaction appears as a mortgage merely. Apart from the mortgage the Plaintiffs are in possession of an estate under the letters patent, and any one who infringes injures their rights. The Defendants do not set up a rival title, but simply say that the Plaintiffs have no rights at all. The mortgagees leave the Plaintiffs in possession, and leave them to work the patent, and until default is made they have all their rights. They clearly had a right to bring the action, and they cannot be denied merely because the Defendants allege that the Plaintiffs

(1) 2nd Ed. p. 359.

have no rights at all. The term "proprietor" under the statute is different from the term "mortgagee."

[KEKEWICH, J.:—The mortgagor is not a proprietor, nor is the mortgagee. Together they constitute a proprietor.]

There has always been a broad distinction between a mortgagee in possession and a mortgagee not in possession.

Sir *R. E. Webster*, A.G., *Warmington*, Q.C., *Moulton*, Q.C., *Carpmael* and *Roskill*, for the Defendants:—

The Plaintiffs are in liquidation, and liability to costs is very important. It is inaccurate to speak of any one as in possession of a patent. Where there has been an assignment of letters patent the assignees are the proper persons to sue. Sect. 23 of the Act, 1883, shews what is the effect of registration. The deed is part of the register, and if the officers make a mistake in the register as to the legal effect of the deed that cannot control the deed. The action cannot be determined in the absence of the mortgagees who are much interested in it. If these Defendants made terms with the Plaintiffs, what is there to prevent the banking company from bringing an action to-morrow?

Aston, in reply:—

If it had been intended that an assignee by way of mortgage should be recognised as a proprietor, the statute would have said so. A mortgagor must have some rights which he can protect. The deed in effect says that the mortgagors, so long as they do not commit default, may exercise all the rights of a proprietor. Even if there is a difficulty as to damages, the Plaintiffs are entitled to an injunction.

KEKEWICH, J.:—

The question calling for decision is one of considerable importance, though I confess that, to my mind, it is one free from all reasonable doubt. Before expressing my opinion upon it, I wish to make two preliminary observations closely connected together. In the first place, I desire to take the opportunity of repeating my regret that there is not some better way and better means

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than there is at present under our practice of deciding these preliminary questions, before all the expense of bringing the case to trial has been incurred; and I am the more bold to express that from the Bench, because I have heard other judges do the same, particularly the late Lord Justice *Lush*. Secondly, I think it right to add that under the system as at present existing there would not have been the slightest difficulty in trying the question long before any expense had been incurred, that is to say, immediately after the defence had been delivered. The objection which I am now considering is *in limine*. It is the objection which the Defendants put forward as the first to be tried, and which they say prevents the necessity of any other question being tried. It was not for them to bring it forward, though they might have done so. I think the Plaintiffs might at once have brought forward the question by summons and have asked the Court to decide it irrespective of any other question in the action, and if that had been done we should have gained much time, and all the costs of the day would have been saved. Without wishing to unduly blame anyone, I cannot forbear from adding that I think it would have been more satisfactory if I had been told yesterday afternoon: "Before we go into any other questions, before we consider the details of this patent and so forth, there is a question of law which, if it is decided against the Plaintiffs, will make all further consideration unnecessary." However, that course has not been taken; great costs have been consequently incurred, and they must, more or less, according to my view of the law, fall on the Plaintiffs, who it is suggested are not particularly well able to bear them.

As regards the real question, it is simply this. The Plaintiffs sue as patentees, that is to say, they sue as assignees of the patent or proprietors of the patent. That is their title, and they sue for the ordinary relief in a patent case. To that the Defendants say, in the plainest possible language, you are not the proprietors, and that is the question to be tried. What is the result if they are not the proprietors is a subordinate question. The first question is, are they proprietors? There is produced to me a mortgage properly executed and properly registered. I say a mortgage, because though I do not forget that there are several

others behind it, it is convenient for the present purpose to bear in mind only the mortgage of the 31st of December, 1885, registered on the 22nd of February, 1886. That is a mortgage in a form with which all conveyancers are familiar. It is a mortgage to a banking company to secure an account current. There is a covenant to pay, and then there is an absolute assignment of the patent subject only to the proviso for redemption. The redemption is on payment of the amount secured by the covenant: that which the Plaintiffs from time to time owe to their bankers; but in the meantime, and until redeemed, the *Halifax Joint Stock Banking Company, Limited*, are the owners by assignment of the patent. That is no new law. A patent has always been assignable, and has been one of those things which, not being land, or interest in land, has always by force of the patent law been assignable at law as well as in Equity. The legal estate, as conveyancers have it, passes by the deed, which of course has to be and has been properly registered. The Attorney-General says that there is some little inaccuracy in speaking of a mortgagor of a patent as in possession. That is so. There is a little inaccuracy; but I cannot help thinking that it is nevertheless a convenient phrase, because we all know what a mortgagor in possession is, and a mortgagor, I think, may be in possession of a patent for some, though not easily defined, purposes. But the deed passing what, for want of a better phrase, I call the legal estate in the patent, it seems to me that, though as between mortgagor and mortgagee there are rights which interfere with the absolute ownership—there is the power of redemption, there is a right to an account, and so on—still the proprietor is the mortgagee who has had the patent assigned to him.

Does the form of the register in any way interfere with that? The banking company have been registered as mortgagees. It may be convenient so to register them, and there cannot in my view be any injury done by so registering them, because the deed is necessarily referred to. The deed is on the file which must, I think, be taken to be part of the register, and any person having from the register notice of the assignment, that is to say, of the mortgage, has, of course, notice also of the deed, and it is his fault if he does not ascertain the exact nature of the

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deed. But it deserves great consideration at the hands of those whose duty it is to look after such things whether any assignee ought to be registered as mortgagee simply, and not as an assignee by way of mortgage. With that, however, I have nothing now to do.

Now, is there anything in the Act which in the slightest degree interferes with this? I have put it in this way because it seems to me that if I find an assignment by the proprietor reserving some rights, still, there being an absolute assignment, and that assignment being registered, I am bound to regard the person to whom the assignment is made as the owner of the legal estate unless the Act says something to the contrary. Mr. *Aston* endeavoured to prove that there is something in the Act to the contrary. To my mind, if the Act be looked into, these sections having been canvassed both by him and by the Attorney-General, they all point the other way. The 85th section must not be forgotten, which excludes trusts. The 87th, which only speaks of "assignment, transmission, or other operation of law," does not indicate any rights of a mortgagor by way of redemption. They all point, to my mind, to the ordinary rule of law holding good, and that an assignment is an assignment although there may be an equity of redemption behind. Therefore, as regards that, it seems to me that the Plaintiffs cannot claim to be proprietors of the patent which they have assigned to the *Halifax Joint Stock Banking Company.*

But then, says Mr. *Aston*, "notwithstanding that, I am entitled to sue. I am a mortgagor in possession, and I am entitled to protect my rights." That, no doubt, is the reason why the inaccurate expression mortgagor in possession is objectionable. What rights has he? I do not say that he has none, and I am not called upon to decide the question whether under this particular mortgage the mortgagee can grant licenses for his own benefit, nor how far the mortgagees can control a power of granting licenses without, so to speak, taking possession—an inaccurate expression again—of the patent. But the mortgagees have full power under this deed to grant licenses, and have full power to sell, fettered of course by the provision that those powers shall not be exercised unless and until certain defaults have occurred,

and until certain notices have been given, but not so as to prevent a good title being made to the purchaser or licensee, who is not bound to inquire whether the provided events have happened or the provided notices have been given. It follows that the Plaintiffs are really in the position (so far as they have any estate at all) of strictly fettered owners, persons who are not able to act for themselves, and that they are not in possession of—to use a doubtful phrase again—the estate, so as to assert any rights of ownership over it. They may have some rights, and they may have a right to sue for some purposes. Mr. *Aston* says, "Surely I am entitled to sue for an injunction to prevent trespass, surely I am entitled to sue for damages and to have the damages assessed, though they may not be payable to me." As regards damages, how can they be assessed when the injury is not to the Plaintiffs, but to some other persons whose patent is infringed? An injunction is a wide term. Whether they can sue for an injunction or not I am not called upon to determine. But to talk of damages and of an injunction as if that were the object of the action is to put the subordinate relief first and to forget the subtance. What is the substance? The substance is that the Plaintiffs say that they are entitled to the benefit of certain letters patent. They ask the Court in effect to declare that they are entitled to those letters patent. The Court would be stultifying itself to make any declaration of the kind either in form or in substance. They ask the Court to decide that the letters patent are valid. The Court might decide that according to the Plaintiffs' contention, and in the presence of the Plaintiffs and the Defendants, and then have to try it over again the very next day between the Defendants and one of the mortgagees who would not be bound by any such decision. The question of validity of course involves novelty, and therefore all questions of anticipation. Some one of these mortgagees may have satisfied himself that he has an excellent title because he is able to give an answer to some claim of anticipation which may not be known to the Plaintiffs' counsel or to the solicitors who instruct them. Any one of these mortgagees would be entitled to say the next day, "True the Court has held this patent to be invalid because it was anticipated by such and such a patent or such and such a publication;

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but I have got a complete answer to that, and you must try the question over again with me." To ask the Court at the suit of the mortgagors to decide all these questions without any power of binding the mortgagees would be contrary to the whole course of judicial practice, and to my mind would be a monstrous absurdity. I think that it is impossible for the Plaintiffs to maintain this action standing alone, and that the first objection is fatal.

Aston, Q.C., asked leave to amend. There was some discussion as to authority to appear for the banking company, and as to the costs of the day; and ultimately the Court, on the 17th of January, made an order that the trial should stand over, and that the costs of the Defendants thrown away (such costs to be taxed on the higher scale) should be the Defendants' costs and be borne by the Plaintiffs in any event, and that the Plaintiffs should be at liberty on the 1st of February to apply to amend the writ by adding parties and otherwise as they might be advised, subject to such terms as the Court might then direct. And in default of such application, or upon such application being refused, the action was to be dismissed with costs on the higher scale.

Feb. 1. The case accordingly came on.

Aston, Q.C., stated that the Plaintiffs had not obtained the consent of the banking company to being made co-Plaintiffs, and that he had no application to make to the Court; but that the Plaintiffs would not oppose any application by the Defendants to have the mortgagees added as defendants; whereupon "the Plaintiffs by their counsel not asking for leave to amend by the addition of parties or otherwise," and "the Court being of opinion that the Plaintiffs are not the registered proprietors of the patent in question in this action," the action was dismissed with costs.

C. M.

C. A.

The Plaintiffs appealed from the Orders of the 17th of January and the 1st of February, 1890. The appeal came on for hearing on the 14th of May, 1890.

Sir *H. Davey*, Q.C., *Aston*, Q.C., *Bousfield*, and *Neill*, for the appeal:—

The objection taken by the Defendants, on the ground of which the action was dismissed, sounds strange to the ears of Equity practitioners—that the registered proprietor of a patent has no right to sue unless his mortgagees are made co-plaintiffs. The objection taken by the Defendants is not for want of parties, but for want of right to sue. Now it is a perfectly settled doctrine of Courts of Equity, and therefore of the High Court, that whatever the form of a mortgage may be, whether by a mere charge or by assignment, the mortgagor remains owner of the property subject to the incumbrance until his right of redemption has been barred by sale or foreclosure. Such a proposition was never heard in a Court of Equity as that a mortgagor in possession could not sue for injury to the mortgaged property unless he could induce his mortgagees to become co-plaintiffs, thereby exposing themselves to the risk of costs. We have not the slightest objection to making the mortgagees defendants if the present Defendants wish it; but they do not ask for that. No doubt if it comes to ascertaining the *quantum* of damages it will be desirable to have the mortgagees before the Court that the account may be settled once for all in the presence of all parties having an interest; but that does not make it necessary to have them here now.

The case comes under the Act of 1883 (46 & 47 Vict. c. 57). The 23rd section provides for keeping a register of patents, "wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licenses under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed;" and it provides for filing copies of deeds and documents "affecting the proprietorship in any letters patent or in any license thereunder." Then by sect. 46: "In and for the purposes of this Act, 'patent' means letters patent for an invention: 'patentee' means the person for the time being entitled to the benefit of a patent." Mr. Justice *Kekewich* goes on this, and says to the Plaintiffs, "You are not the proprietors within the

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meaning of the Act—therefore you cannot sue." If we admitted the learned Judge's premises, we should not admit his conclusion; but we dissent from his premises. We say we come within the definition, for that we are the persons entitled to the benefit of the patent, subject, no doubt, to the registered incumbrances. But, supposing the premises correct, we deny the conclusion. The Act does not, as it does in the case of trade-marks, say that no one but the registered proprietor or the person who is the patentee within the meaning of the Act can sue. "Patentee" is defined "for the purposes of the Act," *i.e.*, for the purposes of amendment, disclaimer, and other purposes mentioned in the Act. Sect. 85 prohibits the registration of trusts, and was referred to below; but it is difficult to see what bearing it can have on the question. The only other section referred to below was sect. 87, on which the Defendants mainly rely (1). But there is nothing in it about suing; and if there were, we maintain that we are the persons entered in the register as proprietors of the patent, though subject to incumbrances. There is nothing in the Act to alter what has long been the settled doctrine of Courts of Equity, that a mortgagor can sue as owner.

One objection was put forward which at first sight appears serious, that unless the mortgagees are joined as co-plaintiffs the Defendants might have to fight the validity of the patent over again with them. But objections to the validity of a patent are put in by way of defence to protect the defendant from the consequences of what if the patent is valid is a legal wrong, and by way of defence only. Now the nature of the defence cannot affect the plaintiff's right to sue. There are analogous cases

(1) Sect. 87. (The words relating to copyrights and trade-marks are omitted): "Where a person becomes entitled by assignment, transmission, or other operation of law to a patent, the comptroller shall on request, and on proof of title to his satisfaction, cause the name of such person to be entered as proprietor of the patent in the register of patents. The person for the time being entered in the register of patents as proprietor of a patent, shall, subject to any rights appearing from such register to be vested in any other person, have power absolutely to assign, grant licenses as to, or otherwise deal with, the same, and to give effectual receipts for any consideration for such assignment, license, or dealing: Provided that any equities in respect of such patent may be enforced in like manner as in respect of any other personal property."

in which an objection of this nature has been overruled. In *Sheehan* v. *Great Eastern Railway Company* (1) one of several co-owners of a patent was held entitled to sue for his share of the profits made by a third party by the use of it without making the other co-owners parties. So in *Dunnicliff* v. *Mallet* (2) it was held that an assignee of a separate and distinct portion of a patent, could sue for damages for infringement without joining one who was entitled to the other part. The present case is in substance decided by *Fairclough* v. *Marshall* (3) where it was held that a mortgagor could sue to restrain an improper use of a house on the property on the principle of *Tulk* v. *Moxhay* (4) without bringing the mortgagee before the Court, and this did not proceed on the *Judicature Act*, 1873, s. 25, sub-s. 5, which was there referred to. In *Speckhart* v. *Campbell* (5) a *cestui que trust* of a patent was held entitled to sue in his own name. In this very case the mortgagors applied for leave to amend the patent and obtained it. There is not a word in the Act to prevent a person from suing in respect of a patent unless his name is on the register, though the earlier Act did contain such a prohibition, and the present Act contains it as to infringement of a trade-mark. A mortgagee not in possession could not sue and recover substantial damages unless he could recover them as trustee for the mortgagor, for he could not shew substantial damage to himself. The point decided by Mr. Justice *Kekewich* was not that the mortgagees must be here, but that they must be here as co-plaintiffs. As to making them defendants, the Judge can do that at any stage if it proves to be desirable; and we do not object to its being done now if the Defendants wish.

Sir *R. E. Webster*, A.G., *Warmington*, Q.C., *Moulton*, Q.C., *Carpmael*, and *Roskill*, for the Defendants:—

We submit that the object of the Act was that actions should only be brought by persons having the legal estate, and the Plaintiffs must either join as co-Plaintiffs the persons having the legal interest, or bring them before the Court so that the Court may be able to settle all the rights.

(1) 16 Ch. D. 59.
(2) 7 C. B. (N.S.) 209.
(3) 4 Ex. D. 37.
(4) 2 Ph. 774.
(5) Johns. Pat. Man. 5th Ed. 239; *Times*, March 13, 1884.

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[COTTON, L.J.:—The objection in your statement of defence is simply that the Plaintiffs have no title to sue.]

That is so on the pleadings; but the order of the 1st of February shews that the Plaintiffs did not apply to amend by making them defendants. Sect. 87 makes it imperative on an assignee to register, and gives him the rights of a proprietor. The mortgagees, being registered as assignees, have under the Act the rights of absolute owners, and can sell or grant licenses. The deed assigns the patent, and gives the assignee power to grant licenses. The assignor then cannot grant licenses, no power to do so being reserved either by the deed or on the register. The assignor, therefore, is not proprietor within the meaning of sect. 87. The assignee has the power to grant licenses, and therefore has power to nullify any injunction that could be obtained in this action as now constituted. Sect. 85 prohibits the notice of trusts on the register, and it cannot have been intended that there should be a person invested with the rights of a proprietor under sect. 87, and that there should be at the same time an assignor who has the same rights of obtaining an injunction as the assignee. The authorities referred to do not meet the case. Co-owners are in quite a different position; each of them is on the register as a proprietor. The only proper plaintiffs are persons who can together exercise full rights of ownership over the patent, and give a complete discharge. As regards *Fairclough* v. *Marshall* (1), we say that there is no analogy between mortgages of real estate and assignments of patents. A mortgagor of land in possession has an interest sufficient to enable him to maintain an action; he is entitled to the benefits of ownership till the mortgagee interferes; but under the terms of this assignment the assignor is not in that position. We do not say that all the mortgagees must be parties; we go on the ground that the banking company are the legal proprietors of this patent.

[COTTON, L.J.:—I doubt whether in *Fairclough* v. *Marshall* the plaintiff could have given a complete discharge.]

Mortgagees are not mentioned in the Act; it deals with

(1) 4 Ex. D. 37.

nothing but patentees and assignees. No doubt the general law as between mortgagor and mortgagee would have to be applied were there nothing to the contrary in the Act; but sect. 87 excludes the ordinary powers of a mortgagor as between the mortgagee and the world; it gives the mortgagee powers which, to the outside world, make him owner.

[COTTON, L.J.:—As at present advised, I think that sect. 87 does not apply, for the banking company are not entered on the register as "proprietors," but as "mortgagees."]

Assuming that they are not proprietors, we submit that they ought to be here in order that complete justice may be done in the presence of all parties interested. Suppose an account directed, it will not be binding on the mortgagees if they are not here.

[COTTON, L.J.:—Subject to what may be said in reply, I think they ought to be here; but you never took that objection.]

Bergmann v. *Macmillan* (1) supports the view that they ought to be here, that the account may be taken once for all.

Sir *H. Davey*, in reply, was directed to confine himself to the question whether the mortgagees ought not to be made defendants.

In *Fairclough* v. *Marshall* (2) it was said by the Court of Appeal that unless it could be shewn that the security of the mortgagees would be damnified by anything which took place in the suit they were not necessary parties. Now here the mortgagees could not be damnified. If the Plaintiffs succeed, the position of the mortgagees would be improved, but their being parties would not help. They could not argue in support of the Plaintiffs' case, and there would be no *res judicata* as between them and their co-Defendants. Their presence will be utterly useless unless and until the Court directs an account of profits, in which case their presence will be wanted. It is too late now for the Defendants to take an objection for want of parties: *Werderman* v. *Société Générale d'Electricité* (3); *Sheehan* v. *Great Eastern Railway Company* (4). I ask the Court to discharge the orders

(1) 17 Ch. D. 423.
(2) 4 Ex. D. 37.
(3) 19 Ch. D. 246.
(4) 16 Ch. D. 59.

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of Mr. Justice *Kekewich* and to give us the costs of the appeal, and all the costs which have been thrown away, and that whether the Court orders the mortgagees to be made defendants or not, for the objection that they ought to have been parties should have been taken in due time.

1890. May 15. COTTON, L.J.:—

This is an appeal by the Plaintiffs against a judgment of Mr. Justice *Kekewich*, who decided that the Plaintiffs had no right of suit, unless they joined with themselves as plaintiffs their mortgagees; and as the first mortgagee, when applied to, refused to be joined as co-plaintiff, the action was dismissed. That, in my opinion, clearly went on this ground, that as the Plaintiffs, the assignees of the patent, had mortgaged their interest, they had no right of action at all against an infringer.

Subject to a question arising under sect. 87, I cannot see anything in the Act which can be alleged to prevent a patentee who has granted a mortgage from suing. The Attorney-General in his argument relied on sects. 46 and 87 of the Act. Sect. 46, to my mind, does not bear upon the point, for it only says, "'Patentee' means the person for the time being entitled to the benefit of a patent." Now, if we are to look to the general law, I should say that the assignee, though he has granted a mortgage, is entitled to the benefit of the patent. It is true that he may by foreclosure or sale under the mortgage be deprived of his right to the patent; but in Equity we look upon a mortgage as only a security for the debt, and that being so we do not say that a mortgagor, although he has mortgaged his patent, is not entitled to the benefit of his patent. He is so entitled, subject to the charge created by the mortgage, and subject to the rights which he has given to his mortgagee.

Sect. 87 was very much relied on, and as to that we have the benefit of knowing what passed between Mr. Justice *Kekewich* and the officer who came with the register from the Patent Office. We find that on the register, copies of entries in which have been furnished to us, the Plaintiffs are registered as assignees under the date of the 22nd of February, 1886, by virtue of two assign-

ments to them, one by the original patentee, and the other by a mortgagee of that patentee. On the same 22nd of February, 1886, there was a registration of a mortgage granted by the Plaintiffs to the banking company who were first mortgagees, and the bank are registered not as assignees, though the mortgage was by assignment in the usual terms of such a mortgage, but as mortgagees. The subsequent mortgagees were registered in the same way. The officer informed Mr. Justice *Kekewich* that there was an intentional difference of language, and that they did not register a mortgagee, even though he took by assignment, as assignee of the patent, and I think that is right. If they had registered the mortgagee as assignee it might have been contended that he was entered in the register as proprietor within the meaning of sect. 87. But the mortgagee, according to the practice of the office, was not registered as the proprietor of the patent, but only as mortgagee, and I think that practice right, because, as I have said, having regard to the rules of Equity we do not consider the mortgagee to be proprietor of what is comprised in his mortgage. Therefore it really is unnecessary to consider the argument of the Attorney-General on sect. 87, because whatever powers are there given are given to the person who is on the register as proprietor, and the mortgagees are not entitled to the benefit of that section. What we have before us is simply a registration of the instruments affecting the title as prescribed by sect. 23, which merely directs that "there shall be kept at the Patent Office a book called '*The Register of Patents*,' wherein shall be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents and licenses under patents, and of amendments, extensions, and revocations of patents and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed." It does not go on to say anything like what is contained in the 87th section, but leaves the Court to decide, when the matter is brought before it, what is the effect of the instruments which are registered. I should have very much hesitated in acceding to the Attorney-General's argument on sect. 87 if we had to consider it, for it is hard to think that the Legislature intended to make such a sweeping alteration

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in the law as to put a mortgagee in the position of proprietor as against his mortgagor. As I have said, however, we need not consider it, because the bank are not registered as proprietors. The question then has to be decided according to the general law. Here we find the assignee of a patent on the register. Then there is on the register an assignment by way of mortgage, and there is filed in the office a copy of that deed. It was pressed upon us that this mortgage gave certain rights to the mortgagee which would interfere very much with any action which might be brought by the patentee. What is the general law? When a man has mortgaged his interest either in land or in personal estate, is he prevented from asserting his right to prevent any one from injuring the mortgaged property or acquiring an adverse right against it? Here I assume (it will have to be decided hereafter whether it is so or not) that there has been an infringement of the patent rights mortgaged by the Plaintiffs. To my mind it would be contrary to the whole course of decisions in Courts of Equity to say that under these circumstances a mortgagor cannot sue for the purpose of preventing an infringement and a violation of the right which, although he has mortgaged it, he still holds, subject, it is true, to any rights which the mortgagee may exercise under and in proper accordance with his mortgage.

It has been decided that the assignee of a part of a patent can bring an action against an infringer without bringing before the Court the person entitled to the other part. That answers many of the arguments of the Attorney-General and Mr. *Warmington* against allowing a mortgagor to bring an action. The case of *Fairclough* v. *Marshall* (1) is very pertinent to the present case. There the plaintiff was not even in as beneficial a position as a mortgagor; but he was rightly treated as being in the same position as if he were the mortgagor, and the Court, consisting of Lord Justice *Bramwell*, Lord Justice *Brett* and myself, held that he was entitled to bring his action without making the person in whom the legal estate was vested a co-plaintiff or bringing him before the Court at all, because the defendant was violating the rights of the plaintiff, and the fact that those rights were to a

(1) 4 Ex. D. 37.

certain extent, vested in another person did not prevent the plaintiff from suing to prevent an infringement of those rights.

Then, what has Mr. Justice *Kekewich* done? He has taken an entirely different view; and he appears to me to have decided that the assignee, though only assignee by way of mortgage, was the only person who could protect the patent as against an infringer. He accordingly dismissed the action. Now, in my opinion, if he was not right in that view he was wrong in dismissing the action, because Order XVI., rule 11, says that no case shall be dismissed for misjoinder or want of joinder of parties; and if he had not thought that the mortgagee must be a co-plaintiff, but only that the mortgagee ought in some way to be before the Court, he would not have dismissed the action, but would have given a direction that the mortgagees should be added as parties. We, therefore, hold that Mr. Justice *Kekewich* was wrong in dismissing the action; and in my opinion we ought to order the Defendants to pay the costs of this appeal and the costs which have been thrown away by the decision of Mr. Justice *Kekewich* preventing the case when it came before him from being tried on the merits. It was urged that we ought not to do so, because the order shews that there was full opportunity given to the Plaintiffs, if they thought fit, to apply for any amendment which they thought desirable. I will consider presently whether we ought to require the mortgagees to be made defendants; but in my opinion that is a wrong reading of the order. It is very true that it is in terms to that effect; but as Mr. Justice *Kekewich* had decided that the mortgagor could not bring an action, it would have been useless for the Plaintiffs to ask for liberty to have the mortgagees made defendants.

Now, what ought we to do as regards the application of the Defendants to add the mortgagees as defendants? Lord Justice *Bowen* suggests, and perhaps he is right, that they do not ask to have the mortgagees made defendants, but object that the action cannot go on unless they are made defendants. The Plaintiffs do not require the mortgagees as defendants. What they seek for in this action will in no way interfere with or be any injury to the mortgagees—in fact, it will be for the benefit of the mortgagees as well as of themselves. The bank, who are the first

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mortgagees, have declined to allow their names to be added as plaintiffs, which, to my mind, is very strong evidence against there being any probability that the Defendants here would suffer any injury at all by the mortgagees not being added as parties. But if any substantial difficulty or danger should hereafter arise to the Defendants from the absence of the mortgagees the Defendants may at any time apply, under Order XVI., rule 11, for an order of the Judge that the mortgagees, or any of them, should be made defendants; and our order will be without prejudice to any such application. If the matter comes to the taking of an account, then the presence of the mortgagees or, at any rate, of the first mortgagee, would be necessary in order to bind the mortgagees by the account; and I do not say that the Defendants may not be able to make out a case for making the mortgagees parties before that; but at present I do not see how they can. I think, then, that we ought to reverse the judgment of Mr. Justice *Kekewich*, and give the Plaintiffs the costs of the appeal and the costs below of any proceedings or evidence which have been thrown away by the order which was made by Mr. Justice *Kekewich*. Then we add liberty to the Defendants to make at any stage of the action such application as they may be advised to have the mortgagees or any of them made Defendants to the action.

LINDLEY, L.J.:—

I agree. The proposition involved in the judgment of Mr. Justice *Kekewich* is very serious, startling, and novel. If he is right, a mortgagor of a patent, unlike the mortgagor of any other property, can obtain no relief against anybody who is destroying the mortgaged property unless he can induce his mortgagees to join with him as co-plaintiffs or can get rid of the mortgage by redeeming it. That is a very startling proposition; to me it is entirely new, and it is a very serious one. The question is, is it sound? It certainly is unsound if tried by the ordinary principles of Equity. I think it would startle anybody who is acquainted with the doctrines of Equity relating to mortgages to be told that a mortgagor by his mortgage so hands over the property as to be precluded from protecting it from destruction

unless he can pay off his mortgage or induce his mortgagee to concur in suing. Such a doctrine is contrary to principle, because the mortgagor does not cease, in the view of a Court of Equity, to be the owner of the property mortgaged; he remains the owner subject to the security, and he has rights available in Equity to protect the subject-matter of that security.

Then it is said that the *Patents Act* places the mortgagor of a patent in a worse position than the mortgagor of any other property. I cannot see that. I have looked in vain through the various sections which have been referred to, and even if these mortgagees were registered as proprietors under sect. 87, which they are not, I should still very much hesitate to come to the conclusion that the mortgagor was incapable of getting redress unless he could induce his mortgagees to join with him or could redeem them. I can find nothing in the Act which warrants such a contention. It appears to me that the mistake which has been made here is an extremely serious one. It is not merely making a mistake as to the course to be pursued in consequence of the absence of proper parties, but it involves as a proposition of law that a mortgagor in the position in which I have assumed him to be is incapable of obtaining redress in a Court of Equity. That appears to me to be wrong. I agree with the form of order which Lord Justice *Cotton* has suggested.

BOWEN, L.J.:—

I am of the same opinion. It seems to me that nothing can be clearer than that a man does not lose his right to protect his property against wrongdoing by a stranger, simply because he has mortgaged it, and nothing that has been said as to the consequences of the opposite doctrine can be too strongly said.

In the present case the mortgagee, who, it is said, ought to be made a co-plaintiff, is not a registered proprietor under sect. 87, and we have not therefore to decide how far sect. 87, as regards mortgagees whose names are registered as those of proprietors under it, disturbs the general law of this Court; we have only to go by the general law. Now it is clear that a mortgagor does not lose his right to protect what is his own because he has created a debt and secured the debt by a mort-

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gage of the property which he seeks to protect. If authority is required, which I hardly think that it is, to support the decision at which we have now arrived, *Fairclough* v. *Marshall* (1) appears to me to cover the present ground.

As I understand, what Mr. Justice *Kekewich* intended to lay down is this. He thought that a mortgagee was a necessary co-plaintiff, or, at all events, must be made a defendant in the suit. I am not so clear as my learned Brothers are that he took the first line alone; if he did, then we entirely disagree with him; but from the order which he made it strikes me that he thought the adding the mortgagees as defendants was a possible way of curing the defect. But if he thought that the defect could be cured by adding the mortgagee as a defendant, I then am strongly of opinion that it was his bounden duty to add him under Order XVI., rule 11; for it is of the essence of the procedure since the *Judicature Act* to take care that an action shall not be defeated by the non-joinder of right parties; and if the Judge sees that a mortgagee's presence is necessary for the purpose of doing justice, he ought not to allow the action to be defeated, but to order him to be made a defendant. That is my view; and Mr. Justice *Kekewich*, in my opinion, was wrong in the first instance in his view of the law of this Court, and wrong also in the second instance in not ordering the mortgagees to be made defendants if he thought, as it strikes me he may have thought, that the defect could be cured by making them defendants.

With regard to the costs, I think that the order which has been indicated by my learned Brethren is the correct one.

The costs of the appeal were given at once, the Plaintiffs' costs thrown away to be the Plaintiffs' costs in any event.

Solicitors for Plaintiffs: *Walker & Whitfield*, agents for *Humphreys & Hirst, Halifax.*

Solicitors for Defendants: *Wilson, Bristows, & Carpmael.*

(1) 4 Ex. D. 37.

H. C. J.

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CHITTY, J.

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April 23

[1890 B. 19.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 4 [*Revised Ed. Statutes, vol. xvii., p.* 528]—"*Owner*"—*Receiver appointed by the Court—Service of Notices under the Act.*

The definition of "owner" in sect. 4 of the *Public Health Act*, 1875, does not include a receiver appointed by the Court; and so service of notices under sect. 150 of the Act on such receiver is not a good service.

ADJOURNED SUMMONS.

On the 8th of July, 1886, the Plaintiffs, as the urban sanitary authority for the borough of *Bacup*, in pursuance of the *Public Health Act*, 1875, served upon one *James Hitchon*, who was the then receiver appointed by the Court in an action of *Taylor* v. *Atherton* (1870 T. 14) of the rents and profits of certain premises the subject of that action, fronting, adjoining, or abutting on a certain street called *Blackwood Road*, in the said borough, a notice requiring him to level, pave, flag, channel, and make good the street on which his said premises fronted in the manner mentioned in such notice.

Such notice not having been complied with, the Plaintiffs thereupon executed the works mentioned and referred to therein, and instructed their surveyor, in pursuance of sect. 150 of the *Public Health Act*, 1875, to assess what proportion was properly payable by the owners of the premises, who accordingly found that the sum of £356 12*s.* 2*d.* was the proportion payable by the owners of the said premises.

Notice of such apportionment was on the 28th of November, 1887, served upon the said *James Hitchon*, the then receiver of the rents and profits of the premises, as the owner of such premises.

On the 1st of December, 1887, the receiver, *James Hitchon*, through his solicitors, objected to the service upon him as receiver of the above notices, and repudiated any liability in respect of the paving of the street; and on the 29th of March, 1888, payment

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of the sum of £356 12*s.* 2*d.* was duly demanded by notice being served on him; but no part of such sum was paid by him.

By an order made in the action of *Taylor* v. *Atherton*, dated the 1st of June, 1888, *James Hitchon* was discharged from the receivership, and one *James Cunliffe* was appointed in his place.

By another order made in the action of *Taylor* v. *Atherton*, dated the 10th of December, 1888, it was ordered that the Plaintiffs in this action should be at liberty, notwithstanding the appointment of a receiver in the action of *Taylor* v. *Atherton*, to bring an action to enforce any right which they might have under the *Public Health Act*, 1875, in respect of the works mentioned in the above notices.

The Plaintiffs accordingly commenced this action against the Defendants as the trustees of the will of *John Turner*, the testator in the action of *Taylor* v. *Atherton*, by originating summons, asking for an order directing an account to be taken of what was due to them for principal and interest in respect of the said sum of £356 12*s.* 2*d.*, and directing their charge upon the premises, under sect. 257 of the *Public Health Act*, 1875, to be enforced by a sale of the premises, or a competent part thereof, in default of payment of what should be found due on taking the account.

The summons was adjourned into Court, the question being whether a "receiver" was included in the definition of "owner" in sect. 4 of the *Public Health Act*, 1875, the definition of "owner" in such section being as follows: "'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

Sect. 257 is in part as follows:—"Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding five pounds per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such

premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

Uppjohn, for the Plaintiffs:—

The question is whether the notice of the 8th of July, 1886, served by the corporation on the receiver as owner, is a good notice, for there is no question that if it is then we have a charge under sect. 257 of the Act. If the notice is bad, I admit we have no charge.

An agent employed to collect the rents of the property charged by the apportionment is an "owner" within the Act: *Mayor of St. Helen's* v. *Kirkham* (1); and I submit that the receiver, as the agent or trustee for other persons, is within the definition of "owner" in sect. 4. In *Eddleston* v. *Francis* (2) the question was raised but not decided whether a receiver appointed by the Court of Chancery was an "owner" within the definition in sect. 4 of the Act; and in *Peck* v. *Waterloo and Seaforth Local Board of Health* (3) it was held that a person *de facto* receiving the rents came within the definition.

[He also referred to *Cook* v. *Montagu* (4).]

Byrne, Q.C., and *Warrington*, for the Defendants:—

A receiver appointed by the Court is not an agent for any other person, and he certainly is not a trustee. We submit that a receiver appointed by the Court is not within the definition of "owner" in sect. 4.

In sect. 2 of the *Nuisances Removal Act for England*, 1855 (18 & 19 Vict. c. 121), which Act is repealed by the *Public Health Act*, 1875, the definition of "owner" includes a receiver or sequestrator appointed by the Court, so that the Legislature must designedly have left these words out in the *Public Health Act*, 1875; and besides that, in sect. 250 of the *Metropolis Local Management Act*, 1855 (18 & 19 Vict. c. 120), the Act immediately preceding the *Nuisances Removal Act*, the definition of

(1) 16 Q. B. D. 403.
(2) 7 C. B. (N.S.) 568.
(3) 2 H. & C. 709.
(4) Law Rep. 7 Q. B. 418.

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"owner" is in the same terms as in the *Public Health Act*, 1875, and does not mention a receiver or sequestrator appointed by the Court.

Upjohn, in reply:—

I submit that the words in sect. 4, "whether on his own account or as agent or trustee for any other person," should be read as if they were in brackets, and then the definition would be, "'owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, or who would so receive the same if such lands or premises were let at a rack-rent."

CHITTY, J.:—

This action is brought to enforce a charge, and it is rightly admitted by Mr. *Upjohn* that there is no charge unless there has been a good notice; whether there is a good notice or not depends upon the 4th section of the *Public Health Act*, 1875. The 4th section is what is commonly called a defining section, and it begins: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them." The term "owner" occurs in the long list of expressions, and the definition is this—"'owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." The notice was served upon a receiver appointed in an action by the Court. A receiver is not an agent for any other person, and a receiver is not a trustee. The receiver is appointed by the order of the Court and is responsible to the Court, and cannot obey the directions of the parties in the action, and in no sense does he stand in the position of agent to the parties who are interested at the suit of whom or one of whom he has been appointed. I am not at liberty to change these two words "agent" or "trustee," and to expand them so as to make them include a person who is not agent or trustee. To do so would be to usurp the functions of the Legislature, and it must

be borne in mind that I am construing a definition section. The Legislature has used a term "owner," which for convenience it thought fit to use throughout the Act, and then to avoid ambiguity it defines it. I am not at liberty to add to the definition or expand the definition. The object of the definition is to make the thing clear.

Mr. *Upjohn* in his argument, which is very ingenious, tried this method of reasoning. He said put the words "whether on his own account or as agent or trustee for any other person" into brackets, then the section will run: "'Owner' means the person for the time being receiving the rack-rent of the lands or premises in connexion with which the word is used, or who would so receive the same if such lands or premises were let at a rack-rent." Then he had to admit that if that had been the language of the Act of Parliament, it could not have been reasonably contended that the person receiving the rents merely as collector would be an owner within the definition, because it is plain from the authorities and the other parts of the Act that whoever is owner within this clause is personally liable, and that would have been a construction which in my opinion would not have been put on the words. Then he ingeniously says that I am to read the words "whether on his own account or as agent or trustee for any other person" as thrown into a bracket, and as put with a view to extend the definition of owner to persons who would not otherwise have been included within it. But he wants to take another step, and wants me to expand the expanding words until I have so expanded them that they shall include some other person not within the clause. The method of reasoning is one I can follow intellectually, but cannot adopt judicially. The result is, that on the construction of this word "owner" the notice is not good. Very curiously, however, additional force is given to the contention on the part of the Defendant that the receiver of the Court (for I am not speaking of the receiver of the parties) is not within the words, by the legislation relating to a cognate subject. In the Act to amend the *Nuisances Removal Acts*, which was passed in 1855, namely, the 18 & 19 Vict. c. 121, there is in the 2nd section a definition of the word "owner," which is in the same words as the definition I have before me in this Act of

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1875, with this remarkable difference. The words are, "or as trustee or agent for any other person, or as receiver or sequestrator appointed by the Court of Chancery or under any order thereof." That being the definition of the Legislature, of course it must have been held for the purposes of that Act that the receiver and the sequestrator were owners. But that is one of the Acts that is repealed by the Act of 1875, and as the Legislature had before it when it was framing the Act of 1875 the wider definition which would have included the receiver appointed by the Court of Chancery or the sequestrator, it advisedly left the words out. It is even more remarkable still, for this additional circumstance I am about to mention shews that the attention of the Legislature was pointedly directed to this question of definition, because in the Act of 18 & 19 Vict. c. 120 (*Metropolis Local Management Act*), which stands in the statute book as the Act immediately preceding the Act of 18 & 19 Vict. c. 121, there is a definition of "owner" which does not include the receiver or the sequestrator. It is expressed in similar terms to that in the *Nuisances Removal Act* with the exception that these words, "receiver and sequestrator appointed by the Court," are omitted. The Legislature, therefore, had before it the definitions and its choice of definition. It appears to me it has advisedly dropped those words seeing the hardship that would be inflicted on receivers and sequestrators. It must be remembered the receiver appointed by the Court to receive rents is not appointed by the Court in a suit always when the inheritance is present. A case of this kind occurs—a tenant for life of the land mortgages his life estate and does not pay interest; the mortgagee applies to the Court and obtains this order for a receiver; the receiver is of course in receipt of the rents a few days after the tenant for life dies, but the receiver, according to the definition of the Act of 18 & 19 Vict. c. 121, would be the owner, and he would be the owner, according to Mr. *Upjohn's* contention on this Act of 1875, who would be personally liable, and he would have no fund for his indemnity, because there would be nothing behind the tenant for life in any way. Possibly, and not improbably, the Legislature had some such view as that which I have been expressing; but, however that may be, it is quite plain that

there is a definition clause, and that I am not at liberty to add to it or to extend it as contended by Mr. *Upjohn*.

That being so, without dealing with some of the arguments which have been presented to me, I am of opinion that the notice is bad, and, as has been admitted, that there is no charge. I perhaps should add that the Legislature has provided for the case of service by sect. 267, namely, by posting the notice up on the property itself.

Solicitors: *Woodcock, Ryland, & Parker*, for *Woodcock & Son, Haslingden; Torr, Janeways, Gribble, & Oddie.*

G. M.

BENGAL SECRETARIAT LIBRARY.

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March 1, 6.

In re EMPIRE MINING COMPANY.

Company—Arrangement with Creditors—Sanction of Court—Jurisdiction—Debenture-holders—Power to sanction Scheme depriving Debenture-holders of their Security—Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104), *s.* 2 [*Revised Ed. Statutes, vol. xvi., p.* 547.]

The power given to the Court by the *Joint Stock Companies Arrangement Act,* 1870, to sanction a scheme between a company and its creditors, extends to debenture-holders, and the Court has jurisdiction to deprive dissentient debenture-holders of their security, and to sanction a scheme which provides that they shall accept fully paid shares in satisfaction of their claims.

But the Court will not sanction a scheme merely because it has been approved by a large majority of creditors; it will require to be satisfied that the proposed arrangement is fair and equitable.

PETITION, under the *Companies Acts* and the *Joint Stock Companies Arrangement Act,* 1870, to obtain the sanction of the Court to a scheme of arrangement between the company and its debenture holders.

The company was incorporated in April, 1886, by registration under the *Companies Acts* as a company limited by shares, its capital being £125,000, in shares of £1 each, its object being to purchase and work some mines situate in the *Montana Territory* of the United States of *America.* Soon after the incorporation of the company it purchased the mines in *Montana,* and also various plant and machinery connected therewith, and proceeded to work the mines. Of the shares, 100,300 were issued, and they were paid up in full.

In May, 1888, the company issued a number of debentures, each of the amount of £50. At the date of the presentation of this petition these debentures, to the total amount of £23,700, were outstanding. They bore interest at the rate of 10 per cent. per annum, and were made repayable on the 31st of May, 1898, or on such earlier day as was provided by each debenture. By each debenture the company charged with the repayment of the principal sum of £50, and the interest thereon, "all the undertaking, lands, works, plant, property, and effects, both real and

personal, of the company, to the intent that this debenture, and all the other debentures forming part of the present issue of £25,000, may rank equally as a first charge upon the same undertaking, lands, works, plant, property, and effects, but so that the same shall be a floating security, and shall not be recorded in the registry of the county of *Lewis* and *Clarke*, in the territory of *Montana*, and shall not hinder any sale, exchange, lease, or other disposition of the said lands, works, plant, and effects, or any part thereof, or any other dealings in the course of the business of the company, but shall attach to the proceeds of sale or exchange, or the lands or other property, chattels, or other effects taken in exchange or purchased with such proceeds, and so that the same shall be no charge on the ordinary moneys of the company, other than the proceeds of the sale of any of the property included in this security."

On the 31st of October, 1889, the company passed an extraordinary resolution for a voluntary winding-up, and the present petitioners were appointed liquidators. A special resolution was afterwards passed conferring on the liquidators a general authority to transfer or sell the whole or any portion of the property or business of the company to another company, and to receive in compensation or part compensation for such transfer or sale shares in any such company, for the purpose of distribution among the members of the *Empire Company*.

By virtue of this authority the liquidators, on the 31st of December, 1889, entered into an agreement with a new company, called *Golden Leaf (Limited)*, for the sale by the *Empire Company* to the new company, and the purchase by that company, of all the undertaking, business, goodwill, property and assets of the *Empire Company*, subject nevertheless to the debentures or other charges, liens, and incumbrances affecting the same. The new company were to pay, satisfy, and discharge all the debts, liabilities, and obligations of the *Empire Company* (except the debenture debt and interest), and to indemnify the *Empire Company*, its liquidators and contributories. The liquidators of the *Empire Company* were to be entitled to have allotted to their nominees 100,300 shares in the new company, credited with 13*s*. per share as paid up thereon, to the intent that such shares

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might be distributed among the members of the *Empire Company*, or their nominees, in accordance with their rights and interests. As the residue of the consideration for the sale, every debenture-holder of the *Empire Company* was to be entitled to request the new company to allot him fifty fully paid up £1 shares in the new company in respect of and in exchange for each fifty debentures held by him of the *Empire Company*, and in discharge of all principal and interest due on such debenture, and the new company was to comply with such request.

On the 22nd of January, 1890, another agreement was entered into, between the *Empire Company* and its liquidators, of the first part, the new company, of the second part, and *E. H. Young*, on behalf of himself, and all other the debenture-holders of the *Empire Company*, of the third part, by which, after a recital of the agreement of the 31st of December, 1889, it was agreed that that agreement should be carried into effect; that each of the debenture-holders of the *Empire Company* should surrender to the new company to be cancelled the debentures held by him, and the new company should allot to him or her fifty fully paid-up £1 shares in the new company in respect of and in exchange for each £50 debenture so surrendered by him or her, and he or she should accept the same in discharge of all principal money and interest due on the surrendered debenture or debentures; and that all further proceedings in two actions of *Clipperton* v. *Empire Company*, and *De Hoghton* v. *Empire Company*, which had been brought by debenture-holders to enforce their security, should be stayed. The agreement stated that it was intended to submit the arrangement embodied therein to a meeting of the debenture-holders, to be convened by order of the High Court pursuant to the provisions of the *Joint Stock Companies Arrangement Act*, 1870, and afterwards to apply for the sanction of the Court. The arrangement was made subject to any modifications or conditions which the Court might think fit to require or impose; and the agreement was made conditional on the arrangement being sanctioned by an extraordinary resolution of the *Empire Company*, and also upon its being sanctioned by the Court.

On the 24th of January, 1890, an order was made by Mr. Justice *North* that a meeting of the debenture-holders of the *Empire*

Company should be convened by the liquidators, for the purpose of considering the scheme of arrangement embodied in the agreement of the 22nd of January, 1890. The meeting was accordingly held on the 12th of February, 1890. There were present at it, in person or by proxy, eighty-one debenture-holders, who together held debentures to the amount of £20,550, and a resolution was passed approving of the arrangement. There voted in favour of the resolution seventy-seven debenture-holders, whose debentures together amounted to £19,900. The other four debenture-holders, whose debentures together amounted to £650, voted against the resolution.

On the 24th of February, 1890, a general meeting of the company was held, and an extraordinary resolution was passed sanctioning the arrangement embodied in the agreement of the 22nd of January, 1890.

The petition stated that, in addition to the money owing upon the debentures, the *Empire Company* was indebted in the sum of £500 to unsecured creditors in *England*, and in the sum of about £9000 to unsecured creditors in *Montana*, of which about £7000 was due to the *Montana National Bank*. These were practically the only debts of the company beyond the moneys due on the security of the debentures. Out of the £9000, creditors in *Montana* to the amount of between £6000 and £7000 had obtained judgments against the company in that country, and had attached the property of the company there, and other creditors were in a position to attach the property at once. The attachments would, as regards the property in *Montana*, give priority over the debts due to the debenture-holders. Of the £500 due in *England*, £273 15*s.* 11*d.* was due to the Crown in respect of income tax, £48 12*s.* 4*d.* was due for stationery, printing, and general expenses, and the remainder was due in respect of costs to the company's solicitors, who had agreed to accept payment in fully paid up shares of the new company.

An affidavit made by a Mr. *De Friese*, who was a counsellor at law in the *United States*, and a member of the Bar of the State of *New York*, stated that he was well acquainted with the laws and constitutions of the *United States* and the territories thereof, and in particular with the laws relating to suits affecting real

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and personal property in the State of *Montana*. The affidavit contained the following statements:—

"I have perused a form of debenture of the *Empire Company*, and I say that the holder of such a debenture, unless it were recorded in the registry of the county of *Lewis* and *Clarke*, *Montana*, could not have, or exercise, any of the rights of a mortgagee over the mines, machinery, and other real and personal estate expressed to be charged by the debenture.

"Attachment suits in the State of *Montana* are commenced by writs of attachment, which writs of attachment are at the time of issue recorded in the proper registry to constitute a lien upon the properties attached, and the proceeds of sale of any of the mines, machinery, or goods and chattels of the company or individual sued, when realised by the sheriff in execution of judgment obtained in any suit, are paid to the creditors in the order in which the writs of attachment are issued and registered. The payment of the debts of the *Empire Company* in the order in which the attachment suits are commenced is not affected by the fact that the company is in liquidation. There are no steps which could be taken on behalf of the debenture-holders in order to obtain an equal distribution of the proceeds of sale of the real and personal estate of the company among all the creditors. Any actions which might be commenced by debenture-holders would be for the benefit of the class, and not for that of the debenture-holders so commencing proceedings, but, even if they so proceeded, the attachment suits already commenced would rank in priority and be settled by payment of debt, interest, and costs, before any sum could be recovered by such debenture-holders."

Cozens-Hardy, Q.C., and *F. B. Palmer*, for the Petitioners:—

Under sect. 2 (1) of the *Joint Stock Companies Arrangement Act*,

(1) Sect. 2: "Where any compromise or arrangement shall be proposed between a company which is, at the time of the passing of this Act or afterwards, in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the *Companies Acts*, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors

1870, there is jurisdiction to sanction this scheme of arrangement. The section applies to all the creditors of a company, or to any class of the creditors, and the debenture-holders are creditors. In *Slater* v. *Darlaston Steel and Iron Company* (1), Sir *George Jessel*, M.R., held that "creditors" included debenture-holders, and he sanctioned a scheme which provided that unsecured creditors of the company should be converted into shareholders. From the reference to this case in *Palmer's* Company Precedents (2), it appears that the scheme also provided that the debenture-holders, as well as the unsecured creditors of the company, should accept fully paid-up shares in a new company to be formed, in satisfaction of their debts.

In *In re North Western, &c., Company* (3), Mr. Justice *Chitty*, on the 22nd of April, 1882, sanctioned a scheme for the reconstruction of a company which was to be wound up, the scheme providing that the holders of debentures of the old company should give up their debentures in exchange for preference shares or stock of a new company, which they were to accept in satisfaction of all claims upon their debentures. In the present case the scheme is supported by an overwhelming majority of those debenture-holders who are not also shareholders.

Napier Higgins, Q.C., and *Farwell*, for debenture-holders to the amount of £9,000, supported the scheme.

Seward Brice, Q.C., and *A. Brown*, for a debenture-holder to the amount of £250:—

There is no jurisdiction under the Act to take away from secured creditors their security, without their consent.

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shall be summoned in such manner as the Court shall direct, and, if a majority in number representing three-fourths in value of such creditors or class of creditors, present either in person or by proxy at such meeting shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company."

Sect. 3: "The word 'company' in this Act shall mean any company liable to be wound up under *The Companies Act*, 1862."

(1) W. N. 1877, pp. 139, 165.

(2) 4th Ed. p. 625.

(3) Palmer's Co. Prec., 3rd Ed. p. 603.

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In *Slater* v. *Darlaston Steel and Iron Company* the note in the *Weekly Notes* states that the only question was, whether the unsecured creditors could be compelled to become shareholders. There is nothing in that or in the other case to shew that the point was contested by the debenture-holders. The Act applies only to "creditors." There is jurisdiction over debenture-holders *quâ* creditors, but not *quâ* mortgagees. The mortgagee of a company in liquidation is outside the winding-up: *In re David Lloyd & Co.* (1); *In re Richards & Co.* (2).

At any rate, the Court, in the exercise of its discretion, will not sanction a scheme which is not fair and reasonable: *In re Dynevor, Dyffryn, and Neath Abbey Collieries Company* (3).

[*Cozens-Hardy*, Q.C., referred to *In re Mammoth Copperopolis of Utah* (4).]

In that case the debenture holders of a company were to accept in satisfaction of their claims the debentures of a new company, to which the property of the old company had been transferred.

It is not enough that a large majority of the debenture-holders is in favour of the scheme; the Court will examine into the fairness of the arrangement. Under the *Railway Companies Act*, 1867, the Court has refused to confirm schemes containing a provision that creditors should accept shares in discharge of their claims: *In re Bristol and North Somerset Railway Company* (5), and the principle of that decision was affirmed by the Court of Appeal in *In re East and West India Dock Company* (6).

This scheme is not one which the Court, in the exercise of its discretion, ought to sanction. Among other objections, it gives an advantage to the shareholders in crediting them with 13s. per share as paid up, and it provides that the unsecured creditors shall be paid in full in cash. Moreover, the debenture-holders are deprived of their overdue interest altogether.

Grosvenor Woods, for another dissentient debenture-holder:—

There is no distinct decision that the Court has jurisdiction to deprive debenture-holders of their security. In dealing with

(1) 6 Ch. D. 339.
(2) 11 Ch. D. 676.
(3) Ibid. 605.
(4) Palmer's Co. Prec., 3rd Ed. p. 606.
(5) Law Rep. 6 Eq. 448.
(6) Ante, p. 38.

resolutions for the reduction of the capital of a company, the Court has said that it will consider the justice of the proposed reduction: *In re Barrow Hæmatite Steel Company* (1). If the debenture-holders were only preference shareholders, such an arrangement would not be valid under sect. 161 of the *Companies Act*, 1862: *Griffith* v. *Paget* (2).

Cozens-Hardy, in reply:—

[NORTH, J. I feel no difficulty about the jurisdiction. But I do not at present see my way to bind the debenture-holders to give up part of their claims, when the other creditors are to be paid in full.]

The debentures not having been registered in *Montana* (as it was agreed they should not be), other creditors have obtained prior charges on the property of the company there. We have not, however, yet obtained evidence as to the law of *Montana*.

[NORTH, J. I shall require evidence of that. The petition must stand over.]

March 8. *Cozens-Hardy*, for the Petitioners, read the affidavit of the American barrister, the effect of which is above stated.

NORTH, J.:—

I think I ought to sanction the proposed arrangement. I feel no doubt about my jurisdiction to do so. The Act gives the Court power to bind "creditors," and debenture-holders are creditors. The word "creditor" in the Act is general. No distinction is made between different kinds of creditors; there is nothing to except any particular class of creditors from the jurisdiction of the Court. But, of course, it is one thing to say there is power to do it, and it is quite a different thing to say that the Court, in the exercise of its discretion, thinks the scheme a proper one to be sanctioned. I felt some little difficulty at first in sanctioning this scheme, for this reason, that the debenture-holders have a first charge for £23,700 on the property of the company, and certainly the scheme proposes to deprive them of the benefit of that security, and also to give to certain unsecured

(1) 39 Ch. D. 582. (2) 5 Ch. D. 894.

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English creditors, to the extent of £500, priority over them. But, when the matter comes to be investigated, the difficulty which I felt disappears. In the first place, as regards the English creditors, about £274, part of the £500, is a Crown debt, which, of course, has priority; and about £177 is due for costs to the company's solicitors, who are content to be paid in fully paid-up shares of the new company. There remains only the small sum of £48, and, if the arrangement is otherwise beneficial, it would be absurd to say that the payment in full of that small amount ought to stand in the way of my sanctioning the scheme. Then, as regards the alleged deprivation of the debenture-holders of their security, I do not see that what is proposed will really have that result. In the first place, it is now clear that there are debts to a considerable amount which have a prior charge in *Montana* by the law of that country as regards the property of the company there, debts in respect of which the creditors have obtained attachments by virtue of which the company's property in *Montana* can be sold. As against those creditors, therefore, the debentures create no charge on the property in *Montana*, because it is part of the bargain under which the debentures were granted, and, indeed, it is expressed upon their face, that they are not to be "recorded" in that country. That being so, these local creditors who have obtained attachments have priority in that country over the claims of the debenture-holders. It is proposed that the debenture-holders, on giving up their so-called security, shall have fully paid-up shares in the new company to a similar amount. Of course they need not take those shares unless they like, but that is what is offered to them. There are debenture-holders to the amount altogether of £23,700. They have held a meeting at which the matter was fully considered, and the debenture-holders were almost unanimous in favour of the proposal. It is true that some who had notice of the meeting did not attend, but the number who did attend, either in person or by proxy, was very large, representing £20,550 out of 23,700. Only four, holding debentures to the amount of £650, voted against the resolution. If the approval of the debenture-holders must be unanimous—if one or two dissentients have a right to stop the whole arrangement—the power given by the Act to the Court to summon

meetings of creditors, and to sanction the scheme approved by a majority, would be rendered nugatory. If I were not to give effect to such an expressed opinion of the creditors as there is in this case, I do not see how there could be any case in which the Court ought to do so. I think I have clearly jurisdiction to sanction the scheme, and I am equally clear that the views of the very large majority of the debenture-holders ought to prevail in the present case. I therefore sanction the proposed scheme.

Solicitors: *Stretton, Hilliard, & Co.; J. W. Smart; Snell, Son, & Greenip.*

W. L. C.

STIRLING, J.

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July 16, 17, 18, 23, 24, 25, 30, 31; *Aug.* 1, 6; *Nov.* 6.

SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY *v.* AIZLEWOOD.

[1887 S. 849]

Building Society—Directors—Power to make Advances on Legal or Equitable Mortgage of Leaseholds—Advance on Security of Leasehold Colliery—Second Mortgage—Redemption of First Mortgagee—Borrowing Money—Expenditure for Protection of Security—Misfeasance—Ultrà Vires—Negligence—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 16, 25 [*Revised Ed. Statutes, vol. xvii., pp.* 210, 211, 213].

The directors of a benefit building society, having a large discretion vested in them as confidential agents, may properly make advances on classes of securities forbidden to ordinary trustees, and are not precluded from making advances on securities of a speculative nature.

By the rules of a building society constituted under the Act of 1874, with the object of raising by the subscriptions of the members a fund for making advances to members on mortgage (*inter alia*) of leasehold estate, it was provided amongst other things (*a*) that none of the directors should be answerable for any act or default of any other of them or for the insufficiency or deficiency in title of any security taken for the repayment of any advances, unless the loss should happen through their own neglect or default; (*b*) that the board should have power to conduct the affairs of the society according to its rules, to appoint agents and committees of directors, and to invest the funds of the company not immediately required for its purposes according to sect. 25 of the Act of 1874 (which authorized investments in leasehold securities); (*c*) that the solicitor of the society should investigate the title to all property offered as security and prepare all mortgages; (*d*) that the funds of the society should be applied at the discretion of the board in making advances to members in respect of the shares held by them on (*inter alia*) legal or equitable mortgage of leasehold property, and (*e*) that when the directors were of opinion that the premises were a sufficient security, and the solicitor was satisfied that the title to the property was satisfactory, the amount granted should be paid to the borrower on his executing a mortgage in the form required by the solicitor.

In 1878 the directors advanced £25,000 to one *J.* upon two securities, the principal of which was a second mortgage of a leasehold colliery, taking at the same time as collateral security a charge upon certain beneficial interests under a trust of personal estate. During the transactions which resulted in the advance, the chairman of the board was in direct communication with the borrower, and took an active part in inquiring into the nature and value of the security; while the other directors simply exercised in good faith their judgment on the materials submitted to them;

and the advance was made upon a valuation and report by a competent surveyor selected by the chairman from five surveyors whose names were submitted by the borrower :—

Held (1), that an advance upon the security of a leasehold colliery was not *ultrà vires* the society.

(2.) That the inclusion of the interests in personal estate as collateral security did not *ex necessitatæ* vitiate the whole loan, though the propriety of the transaction must be tested as if no such ingredient entered into it.

(3.) That it was within the powers of the directors to accept a leasehold colliery as security for an advance.

(4.) That as the rules of the society did not limit the directors to securities under which a legal estate would be vested in them, and the risk of foreclosure by the first mortgagee was one which a man of business and ordinary prudence might be willing to incur, the directors were not guilty of negligence in acting on the report of the surveyor, and taking a second mortgage as their principal security.

(5.) That the chairman, against whom the action came on in default of pleading to allegations that the advance was made upon improper security, was, but that the other directors were not, liable to make good to the society the loss of the sum advanced.

In 1881 the first mortgagees of the principal colliery comprised in the society's security threatened to foreclose, and the directors made a further advance to *J.* of £41,000, £10,000 of which they borrowed for the purpose under their borrowing powers; and they subsequently entered into possession of the colliery, and paid an arrear of wages then due to the colliers, and they further expended considerable sums in payment of rents and royalties, and in working and maintaining the colliery until the society went into liquidation :—

Held (1), that, as the first advance was within their powers, the directors had power by implication to do those things which might result from the working out of the relation subsisting between first and second mortgagees, and accordingly had power to redeem the first mortgagee, and to exercise their borrowing powers for the purpose of paying him off.

(2.) That they also had power to enter into possession of the mortgaged property, and to pay out of the assets of the society the rents reserved by the lease, and the proper expenses of maintaining and working the colliery without rendering themselves liable for such expenditure; but (3) that an inquiry must be directed as to the sum paid by the directors for arrears of wages when they took possession, as such payment was not one for which there was a potential necessity.

Small v. *Smith* (1) and *Royal Bank of India's Case* (2) explained.

THIS was an action by the *Sheffield and South Yorkshire Permanent Building Society*, now in liquidation, against certain of the former directors of the society and the legal personal represen-

(1) 10 App. Cas. 119. (2) Law Rep. 4 Ch. 252.

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tatives of two deceased directors, seeking a declaration that the directors who were Defendants, and the estates of the deceased directors, were jointly and severally liable to make good to the society certain sums of money advanced out of the assets of the society to one *Thomas Joseph*, upon mortgage securities consisting chiefly of leasehold collieries in *Wales*, and also certain sums of money expended out of the assets of the society for the preservation of those securities and the maintenance and working of the collieries, and also seeking the relief consequential upon such a declaration.

The Plaintiff society was originally formed under the provisions of the Act 6 & 7 Will. 4, c. 32, under rules which were originally certified on the 24th of August, 1868, and were subsequently altered and certified on the 19th of May, 1874.

After the passing on the 30th of July, 1874, of the *Building Societies Act* of 1874, the rules were again altered by the society, and the rules so altered were on the 1st of July, 1876, certified as being registered under that Act in accordance with sect. 18 thereof. These rules continued in force down to the commencement of the winding-up of the society.

The *Building Societies Act*, 1874, in sect. 13, defines the object of such societies as being to raise, "by the subscriptions of the members, a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate, by way of mortgage." By sect. 16 the rules of every such society are to set forth certain matters in that section specified, including "The purposes to which the funds of the society are to be applied, and the manner in which they are to be invested;" and by sect. 25, any portion of the funds of the society not immediately required for its purposes may from time to time be invested as the rules permit, "upon real or leasehold securities, or in the public funds, or in or upon any Parliamentary stock or securities, or in or upon any stock or securities payment of the interest on which is guaranteed by authority of Parliament."

By the rules of 1876 (rule 1) the objects of the society were defined in terms of the Act of 1874, namely, "to raise by subscription of the members a stock or fund for making advances to

members on the security of freehold, copyhold, and leasehold estate, by way of mortgage."

By rule 2, the business of the society was to be conducted daily during ordinary business hours, at the society's offices in *Sheffield*.

By rule 10, the management of the society's business was to be under the control of the board of directors.

Rule 11 provided that the board of directors was to be composed of not less than six or more than twelve members. And there were to be a surveyor, solicitor, two auditors, and a secretary.

By rule 12, the directors and auditors were to be elected at the annual meetings of the society by vote of the members, and by rule 13 the solicitor, surveyor, and secretary were to be considered as permanent officers, and were not to be removed from office, except by a majority of two-thirds of the directors present at a meeting called specially for the purpose.

Rule 14 was as follows: "The directors and all other officers of the society shall be, and are, hereby indemnified and saved harmless out of its funds and property from and against all losses, costs, charges, damages, and expenses which they may incur or be put unto in or about the execution of their respective offices, trusts, and services; and none of them shall be answerable for any act or default of any other of them; or for the insufficiency or deficiency in the title or otherwise of any security whatsoever which shall be taken for the repayment of any advance, unless the loss arising by such means shall happen through their own neglect or default."

By rule 17, the directors were to meet at least once a month for the transaction of business.

By rule 19, it was provided that, "The board shall have full power and discretion to conduct the affairs of the society according to the rules, to make bye-laws not inconsistent with the rules for the guidance of the officers and members in carrying the rules into execution, to appoint agents and committees of directors, and also to appoint, and from time to time remove, trustees, for the purposes mentioned in the 25th section of the *Building Societies Act*, 1874; they shall also have power (*a*) to

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invest any portion of the funds of the society not immediately required for its purposes according to sect. 25, *Building Societies Act*, 1874." (*e*) "To receive deposits or loans at interest from the members or other persons, or from corporate bodies, or joint stock companies, not exceeding two-thirds of the amount for the time being secured to the society by mortgages from the members." (*g*) "To do such other acts and deeds as are authorized by these rules, or by the *Building Societies Act*, 1874."

By rule 24, the secretary was to conduct the general business of the society under the control of the directors.

By rule 25, the surveyor of the society was to be allowed for every valuation and survey of property such amount as the directors might decide, having regard to the extent and value of the property.

Rule 26 provided that, "The solicitor shall transact the legal business of the society and investigate the title to all property offered as security, and where such title is not deemed by him good and sufficient, shall render a report thereof, in writing, to the directors. He shall prepare all mortgages, and deliver to each mortgagor a schedule of all deeds and documents deposited by him with the society, and shall furnish to the auditors a copy of all such schedules relating to properties mortgaged. He shall be responsible for the safe custody of all deeds and documents deposited by mortgagors with him, and shall attend the auditors in their inspection of the schedules. He shall be at liberty to attend any meeting of the directors, and may take part in any discussion, but shall not have power to vote."

Rule 47 dealt with the application of the funds of the society, and provided that, "The funds of the society shall be applied by and at the discretion of the board in making advances to members in respect of the shares held by them on legal or equitable mortgage of freehold, copyhold, or leasehold property for such periods and at such rate of interest as the board may from time to time approve. Such commission in respect of each share advanced to any member, as may from time to time be determined by the board, shall be deducted from the amount to be advanced, or shall be paid in such other way as may be agreed upon between the board and the member offering the security."

This rule, as was pointed out by Mr. Justice *Stirling* in that part of his judgment which stated the facts of the case, differed in one material respect from a similar rule contained in the original rules of the society. In one of those there was an express provision that no money should be advanced by way of second mortgage; and it was stated by one of the Defendants on cross-examination that the alteration was made under the advice of the solicitor to the society, and for the purpose of authorizing advances on second mortgage.

Rule 48 provided that, "Any person desirous of receiving an advance, or of ascertaining what amount will be advanced upon any property, shall give to the secretary, on a form supplied for that purpose, a description of the premises intended to be offered as security. The surveyor's fee for examining the property must be paid at the same time."

Rule 49 provided that, "When the directors are of opinion that the premises are a sufficient security, and the solicitor is satisfied that the title to the property is satisfactory, the amount granted shall be paid to the borrower on his executing a mortgage of the premises in such form and with such conditions as the solicitor shall require, and depositing the same, with all other title deeds, with the society."

Rules 50 and 51 relate to advances for purposes of building, and it was provided by rule 51 as follows: "Should any member after receiving a portion of his advance leave the buildings unfinished, the directors may either sell such premises or complete the same at the cost of the member, and the money paid with the attendant expenses shall be a charge upon the premises with interest at 6 per cent. per annum."

Rule 53 provided that, "Whenever any property mortgaged to this society shall be subject to a chief or ground rent, the owner shall produce to the secretary a receipt for such rent within 21 days after it becomes due. And in case the rent shall not be duly paid, the directors may order the amount to be advanced out of the society's funds and charged to the member, with a fine of 1*s.* per pound per month till the same be repaid."

Rule 54 provided that, "No alteration shall be made to pro-

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perty mortgaged to the society without first obtaining the consent of the directors, and any member making alterations without such consent shall be fined in such an amount as they may determine, and they may require the advance to be repaid."

Rule 60 provided, that "The monthly repayments in respect of a loan of £100, including interest, shall for the following terms be—5 years' term, £1 19*s.* 1*d.*; 7 years' term, £1 9*s.* 4*d.*; 10 years' term, £1 2*s.* 2*d.*; 12 years' term, 19*s.* 4*d.*; 14 years' term, 17*s.* 6*d.*"

Rule 69 provided that, "The surplus profits, if any, after providing for interest on deposits and investing shares, for all losses by bad and doubtful debts and securities, and for all expenses properly chargeable, shall be apportioned as a bonus among the holders of investing shares."

The transactions complained of in this action commenced in 1878. Down to that time the society had carried on a large business with considerable success. According to the evidence, the average turnover of the society during the period from 1870 to 1878, was £100,000 per annum; the average amount received on loans was £60,000 in each year, and the investing shareholders had received on the average 9 per cent. per annum.

In 1878 there were twelve directors—*John Aizlewood, Alfred Bennett, Henry Bloor, Thomas Charlesworth, Robert Thomas Eadon, John Taylor, John Wilson, Simeon Hayes, Joseph Brailsford,* and *Alfred Allott,* who were Defendants to this action; and *Robert Leader* and *Henry Loxley,* since deceased, whose estates the Plaintiffs sought to make liable. Of these the first seven continued directors until the winding-up of the society in July, 1886. *Hayes* continued a director till April, 1886; *Brailsford* till February, 1884; *Allott* till December, 1881; *Leader* till March, 1881; *Loxley* till April, 1882.

Mr. *Alfred Allott,* who was the chairman, was a member of a firm of accountants in *Sheffield,* and was also interested in colliery properties. He appeared from the evidence to have been a good man of business, and to have had a large amount of experience in colliery matters. He became chairman in 1874, having previously been secretary. His partner, Mr. *Kidner,* succeeded him as secretary, and continued to be such until 1881, when he was

succeeded by Mr. *Wilson*. The solicitor of the society was Mr. *Edward Webster*, of the firm of *Webster & Styring*. The surveyor was a Mr. *Innocent*, an architect, residing and practising in *Sheffield*, and without any knowledge of collieries. The directors other than Mr. *Allott* were tradesmen or manufacturers in *Sheffield*, and had no special acquaintance with collieries or with colliery business.

Early in 1878, a Mr. *Thomas Joseph* made inquiry of Mr. *Allott* as to whether he could arrange an advance of £20,000 on mortgage. The matter was entertained by Mr. *Allott*, and some information as to the nature of the proposed security, which consisted of Mr. *Joseph's* interest in certain collieries in *South Wales*, was furnished to him in three letters, dated the 21st and 22nd of February, and the 1st of March in that year. On the 3rd of April the subject was brought before the directors of the society, but they declined to come to a definite conclusion without further information.

On the 5th of April Mr. *Joseph* wrote to Mr. *Allott* a letter, the material part of which was as follows:—

"Assuming that you can obtain the loan for me, will you let me know at *Tydraw, Treherbert*, if possible in the meantime, what would be your proposed rate of interest, time of repayment, and the commission per cent. upon the amount? Lawyers' costs and all other expenses to be added. The property is so well known to the following leading mining engineers in the district, that by reference to any of them a valuation could be obtained in a few days' time—Mr. *William Thomas Lewis, Aberdare*; Mr. *William Adams, Cardiff*; Mr. *Evan Daniel, Swansea*; Mr *Richard Bedlington, Aberdare*; Mr. *Herbert Kirkhouse, Pendyren's Colliery, Pontypridd*. My solicitor, Mr. *G. F. Hill*, of *Cardiff*, will satisfy you as to the title, and give all assistance required in the matter. Enclosed herewith I send a statement of particulars of securities offered, drawn up by Mr. *Hill*—you will observe that I have put the sum required at £25,000; but if your clients cannot arrange for that amount, I shall be content with £20,000. You will see from the particulars that I have (or Mr. *Hill* for me) named at the end a source from which the loan can be repaid if required, and the trustees referred to

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therein will, if the loan be £25,000, give an undertaking as security to the proposed mortgagee to that effect."

The particulars referred to in the letter were headed, "Particulars of security upon which a loan of £25,000 is required," and were as follows:—

"1. A first mortgage upon a leasehold residence called '*Tydraw*,' and eight cottages, situated in the *Rhondda Valley, Glamorganshire*, held under a lease from the Earl of *Dunraven*, of which thirty-nine years are unexpired; also the agricultural surface of 900 acres, with tipping and other rights (worth £3 per acre per annum when exercised), over 600 acres of land in the same valley, held under the same lease. The rent payable in respect of the whole of the above is £90 per annum. The estimated value of the above is £10,000.

"2. A first mortgage upon all the minerals beneath 620 acres of land close to the property comprised in head No. 1, held for a term of sixty years, from the Earl of *Jersey*, from December, 1869, at £500 per annum certain rent, but with the usual average clause. The royalty is 6*d.* per ton of 2520 lbs. The estimated value of this lease is £20,000 and upwards. There is no obligation to sink pits on this property, and it comprises the best *South Wales* steam coal.

"3. A second mortgage upon *Dunraven Colliery*, comprising all the minerals beneath 995 acres of land in the *Rhondda Valley*, held under leases granted in 1857, for terms of which thirty-nine years are unexpired, at certain rents in the aggregate of £1200 per annum, with the usual average clauses, and at royalties averaging in respect of a portion of the taking 8½*d.* for thick seams, and 6*d.* for thin seams of coal, per ton of 2520 lbs., and averaging in respect of the remainder of the taking 6½*d.* for thick seams, and 5*d.* for thin seams of coal per ton of 2520 lbs.; also all the plant, workshops, engines, and appliances connected with the colliery, and including twenty-four houses held in connection with the colliery. There are a pair of large pits sunk on the colliery, both fitted up with machinery capable of raising nearly 1000 tons per day from each pit. The colliery is in regular work, as all the coal raised from it has been sold to

a substantial firm for four years to come at the trade prices of the time, and on cash payments. The colliery and property enumerated under head No. 3 fetched £155,000 when sold in 1872. There is a power in one of the leases, under which 395 acres of the minerals are held, to renew for a further term of forty years at same rents, royalties, and terms, upon payment of a sum of £100. This colliery comprises the best *South Wales* steam coal.

"4. A second mortgage upon 100 houses, four houses and two schoolrooms adjoining the above colliery, held under leases lately granted for original terms of ninety-nine years at low ground rents. The sum of £85,000 has been spent since 1872 in the erection of these houses, and the above-mentioned workshops, engines, and appliances, and in developing the under workings connected with the colliery, making with the above £155,000 the sum of £240,000. The present owner purchased in 1876 all the property enumerated under heads Nos. 3 and 4 (and which had cost £24,000) for £80,000, of which last-named sum he has paid £20,000, and the remainder, £60,000, is secured by a mortgage of the colliery and property comprised in heads Nos. 3 and 4. This £60,000 is payable as follows:—£20,000 now due" (it was, in point of fact, due on the 27th of March, 1878), "and £40,000 in October, 1881. The present owner intends to apply £20,000, part of the £25,000 he seeks now to raise, in payment off of the instalment of £20,000, now due to the existing mortgagees. The first charge on the colliery and property comprised in heads Nos. 3 and 4 would then stand at £40,000 only. It should be also stated that the present owner has, since he purchased in 1876, laid out £5000 in completing underground works at the colliery. The trustees under the present owner's family settlements will be receiving about £22,500 from their trust property, which sum (when received) they are willing to lend upon the security of a second charge of the colliery and property comprised in heads Nos. 3 and 4, and with which money any person now lending the £25,000 can (if so desired), be paid off to the extent of the amount received by the trustees, the balance being made up at the time by the present owner of the colliery and property."

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Mr. *William Thomas Lewis*, the first named of the mining engineers to whom reference was made in Mr. *Joseph's* letter of the 5th of April, was a mining engineer of great eminence, who was agent to the Marquis of *Bute* and other large colliery proprietors in *South Wales*, and afterwards became Sir *William Lewis*.

On the 10th of April Mr. *Allott* wrote to Mr. *W. T. Lewis* a letter, in which he said: "Mr. *Thomas Joseph* has authorized me to ask your opinion of his colliery at *Treherbert*, as a security for a loan of £25,000, as a second mortgage after the balance of £40,000 secured by first mortgage. Mr. *Joseph* offers as further security his house at *Ty-Draw*, and an unopened coalfield, of which he holds a lease."

On the 11th of April Mr. *Lewis* replied: "I am favoured with yours of yesterday's date with reference to the value of Mr. *Thomas Joseph's* coal and house property at *Treherbert* as a security for a loan of £25,000. I am, and have been, intimately acquainted with the whole of the property set forth by Mr. *Joseph* as the proposed security for the amount he requires, and I have no hesitation in stating that it is more than abundant for such an advance as he requires, in addition to the £40,000 first mortgage. A very large sum of money has been expended on the property during the last four or five years in cottages, workshops, and other permanent erections, and also in works necessary for the development of the minerals; and I believe, if you had time to inspect the property yourself, you would feel satisfied that the security offered is amply sufficient for the protection of you and your friends who propose making the advance. Perhaps I should add that I am also well acquainted with the trust property which Mr. *Joseph* offers as collateral security, and which embraces an interest in some of the best steam-coal properties in this district. If you purpose making an inspection of the property, and if you think it would be any advantage my meeting you on the ground, it would afford me pleasure to do so, upon having two or three days' notice."

On the 15th of April the matter was again brought before the board of directors, and the letter of the 5th of April was communicated to the meeting. Mr. *Allott*, according to the evidence

of the Defendant *Brailsford*, stated that he had selected Mr. *Lewis* as being the first on the list, and the directors approved the choice, relying on the fact that he was the Marquis of *Bute's* agent. The minute upon the subject was as follows: "Mr. *Allott* reported that since the last meeting he had seen Mr. *Joseph* in *London*, and had made further inquiries as to his position and character. One of Mr. *Joseph's* references was Mr. *William Thomas Lewis*, the agent of the Marquis of *Bute*. A letter from him was read to the board, stating amongst other things that from his knowledge of the property he had no hesitation in stating there was ample security. Mr. *Allott* proposed to visit the property next week, and requested one of the directors to accompany him. The application is for £25,000, on security of second mortgage of Mr. *Joseph's* colliery property, cottages, schools, &c.; first mortgage of his house and grounds, which he estimates to be worth £10,000; with a charge on certain trust property, with the consent of the trustees, which has been valued at over £20,000. The proposal was very favourably entertained, and it was resolved that, should the facts stated be substantiated on further inquiry, the loan would be granted."

It was arranged by Mr. *Allott* and Mr. *Lewis* that they should meet at the colliery on the 23rd of April, and they met accordingly, and made certain investigations with reference to it, and on the 27th of April Mr. *Lewis* wrote to Mr. *Allott* a report in the form of a letter, saying: "In compliance with your request, I visited the *Dunraven Colliery* on Tuesday last, with the view of advising you as to the condition of the workings and the general prospects of the property, having regard to its successful competition with similar properties in the steam-coal trade." This letter, after remarks as to the proposed security, concluded as follows: "As I mentioned to you in my letter of the 11th instant, I am intimately acquainted with the *Ferndale Collieries* and the other properties included in the trust estate which is intended as a collateral security. I have not inspected these collieries very recently; but from my general knowledge of them, and particulars obtained soon after the death of the late Mr. *Frederick Davis*, in my opinion the value of Mr. *Joseph's* interests may be safely assumed at £23,000. Taking all matters

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into consideration as set forth in the particulars of security which you were good enough to lend me, it appears to me, as far as I am able to judge of the value of such properties from a considerable experience in this and other districts, that there is an ample margin of value beyond the amount sought by Mr. *Joseph*, and therefore that you and your friends will be sufficiently protected for the advance of £25,000 as proposed."

This report was forwarded to Mr. *Allott*, in a letter from Mr. *Lewis*, which said: "I enclose, as promised, brief remarks upon my inspection of this property, which I hope will be satisfactory to you. I don't know whether I am supposed to be acting for you, or for Mr. *Joseph* in the matter; but as a rule the parties making the advance include my fees in the costs of the transaction."

In the meantime the solicitors of Mr. *Joseph* and the society were put into communication as to the title. Mr. *Hill*, Mr. *Joseph's* solicitor, on the 18th of April, forwarded to Mr. *Webster*, the society's solicitor, the abstracts of title and particulars of the security, and on the 25th of April Mr. *Webster* made certain requisitions thereon, one being to the effect that receipts for the last rents and royalties due were to be produced on completion; to which, on the 30th of April, Mr. *Hill* replied that those would be produced. This was never done, and in fact, at the date of the advance, the rents and royalties were in arrear to the extent of upwards of £3000.

On the 1st of May a board meeting took place, the minute as to which was as follows: "Mr. *Allott* reported that he went to *South Wales* on Monday week, and looked over the property with Mr. *W. T. Lewis*, mining engineer, and made inquiries as to all the securities referred to in the last minutes, and inspected Mr. *Joseph's* books, and with Mr. *Lewis* examined the costs. He requested Mr. *Lewis* to write a short report, giving his opinion as to the securities. This report was read to the directors, and was of a very satisfactory character. From all that Mr. *Allott* could ascertain, he had confidence in recommending that the loan be granted. Unanimously resolved accordingly." The report referred to was the letter of Mr. *Lewis* of the 27th of April.

Early in May difficulties were raised by the society's solicitor

as to the power of the trustees of the settlement referred to in the particulars to lend their trust funds on the security of a second mortgage. With reference to this, the opinion of counsel was taken, and it was adverse to the existence of such power. The completion of the loan was therefore delayed.

On the 25th of May Mr. *Lewis* wrote to Mr. *Allott* a letter, in which he said that he could hardly conceive that Mr. *Allott* would feel justified in declining the business, and that he hoped the advance would be made.

In reply to this letter, Mr. *Allott*, on the 27th of May, wrote to Mr. *Lewis*, and requested him to give an opinion as to the value of the colliery and other properties, separating the items, and giving the value which at that time he attached to each, instead of summarising the items and giving his opinion that there was ample value, as had been done in the letter of the 27th of April; and he also asked Mr. *Lewis* to state to him confidentially his opinion as to the ability of Mr. *Joseph* to make the repayments to the building society, which would amount to £277 1*s.* 8*d.* per month.

After receiving this letter, Mr. *Lewis* made an inspection of the cottages and other buildings included in the security, and on the 30th of May he wrote to Mr. *Allott* a letter in the following terms: "In further reply to your favour of the 27th as to the separate value I attach to the several items proposed to be included in the security in connection with *Dunraven Colliery*, I beg leave to give you the following particulars, *i.e.*:—(1.) *Ty-Draw House* with eight cottages, held under a lease from the Earl of *Dunraven*, together with the agricultural land and tipping rights in connection with the colliery, which I estimate to be worth £5880. (2.) The mineral lease of 620 acres of the Earl of *Jersey's* property, and under 360 acres of the property of the Marquis of *Bute* and Mr. *J. Homfray*, both of which adjoin the present *Dunraven* taking, which I estimate to be worth £14,800. (3.) The *Dunraven Colliery*, with the mineral leases of 995 acres, with pits, levels, railway sidings, engines and machinery, together with all the appliances necessary for an output of 1000 tons per day; also including twenty-four workmen's cottages held therewith, which I estimate to be worth £92,960. (4.) The

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leases of 104 houses and two schoolrooms, situate at a convenient distance, for the use of the *Dunraven Colliery*, which I estimate to be worth £16,900—total, £130,540. In fixing the above values, I have taken what would be considered a fair average over a term of years, making, of course, due allowance for the risk incidental to the several descriptions of property, as also a deduction to cover a continuation of depressed trade."

As to the ability of Mr. *Joseph* to make the repayments, Mr. *Lewis* made a verbal statement to Mr. *Allott* on the 4th of June, the effect of which was given in a letter of Mr. *Allott* to Mr. *Kidner* of that date, as follows: "He says that *Joseph* is not dependent upon the colliery for his monthly repayments, and that for two years he can see his way to pay them entirely independently of the colliery. He will include in the security the *Bute* lease, which was not at first included, but which Mr. *Lewis* includes in his valuation." The *Bute* lease referred to in this letter was "the mineral lease, ... under 360 acres of the property of the Marquis of *Bute* and Mr. *J. Homfray*, both of which adjoin the present *Danraven* taking," included in item No. 2 of Mr. *Lewis's* report of the 30th of May, 1878.

On the 4th of June the matter was again brought before the board, and the minute of the proceedings was as follows: "*Thomas Joseph.* The secretary reported that the collateral security for this loan turned out to have been settled by Mr. *Joseph* upon trustees for the benefit of his wife and children; and that in consequence of this, as some of the children were under age, it was impossible to give a legal charge upon this collateral security, so far as the shares of those children who are under age are concerned. Notwithstanding this, however, so satisfied are the trustees that they will be perfectly safe in doing so, they will advance the whole amount on second mortgage to the colliery as soon as they receive it at the end of about five years, and out of this the money due to the society will be paid off. The three children who are now of age will give their consent, thus making three shares, amounting together to £7500, legally secured to the society. Mr. *Joseph* deposits promissory notes amounting to about £2500 for advances made by him to different persons as security that the consent of another son will

be given when he comes of age in about twelve months, and after this the notes are to remain as security for the assent of the other children. The collateral security may therefore be considered assured to the extent of £12,500, and the balance of the loan at the end of five years will be about £15,000. Mr. *William Thomas Lewis*, the Marquis of *Bute's* agent, has also been requested to give a valuation of the separate properties proposed to be secured to the society, exclusive of that to which reference has just been made. He values the mineral leases, the house and surface rights, at £20,680, and upon this a first charge is given to the society. He values the colliery and cottages at £109,680, upon which the society will have a charge subject to a first mortgage of £40,000. Mr. *Lewis's* report was read, containing the above figures, and also his letter, in which he states that Mr. *Joseph* has other means, and is not dependent upon the colliery to make the repayments which will be due to the society. These circumstances having been considered, it was felt that there was ample security for the loan, and it was accordingly resolved that it should proceed, notwithstanding the alteration in the collateral security." The letter there referred to was, according to the evidence of the Defendant *Brailsford*, that of *Allott* to *Kidner*, of the 4th of June.

Under this resolution the transaction was completed, and the mortgage money paid over on the 15th of June.

The properties which formed the subject-matter of the security given by Mr. *Joseph* were four in number—the *Dunraven*, the *Hendrewen*, the *Blaenselsig*, and the *Blaengwynfi* properties, and were all held under different titles. The *Dunraven* and *Hendrewen* properties abutted on each other and on *Blaenselsig*, by which last-mentioned property they were entirely separated from *Blaengwynfi*. The *Dunraven* property included a residence, called "*Tydraw*," and the surface of 335 acres; of the minerals under those 335 acres and 265 acres besides (making in all 600 acres), and the colliery works connected therewith, all held under a lease dated the 13th of April, 1858, for a term of sixty years from the 1st of November, 1856, at a dead rent of £800. This lease contained covenants for the payment of the rent and royalties, and also a covenant by the lessee to work the mines

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demised in a proper and workmanlike manner, and to get and obtain from every part of the mines and strata so much of the minerals as could reasonably be got thereout, and to employ in working the same a proper and sufficient number of workmen and machinery, and *bonâ fide* and effectually to carry on and prosecute the works to the best of the lessees' judgment, skill, and discretion. There was a special power of distress, and a power of re-entry for non-payment of rent, but not for breach of covenant.

The *Dunraven* property also included 100 cottages, held under a separate lease, dated the 14th of October, 1875, for a term of ninety-nine years from the 1st of May, 1875, at a rent of £160. The 900 acres mentioned in the first clause of the "particulars of security" sent with Mr. *Joseph's* letter of the 5th of April, 1878, consisted of 335 acres comprised in the said lease of the 13th of April, 1858, and of 565 acres of mountain land or sheep-walk held by Mr. *Joseph* on a yearly tenancy. The 600 acres over which the tipping right extended included those 335 acres.

The *Hendrewen* property consisted of the minerals under 395 acres, held under a lease, dated the 26th of August, 1857, for a term of sixty years from the 1st of January, 1857, at a dead rent after the 1st of January, 1862, of £400. This lease contained a clause under which the lessee could on certain terms obtain a lease for a further term of forty years. It also contained a covenant on the part of the lessee to work the minerals uninterruptedly, regularly, properly, and productively; and a proviso for re-entry for non-payment of rent or default in the observance or performance of the lessees' covenants.

The *Blaengwynfi* property consisted of the minerals under 620 acres, held under a lease, dated the 28th of January, 1875, for a term of sixty years from Christmas, 1869, at a dead rent of £500. This lease contained a covenant on the part of the lessee to win and get the minerals regularly and effectually, so as to work the largest possible quantity of marketable coal, and other minerals, without causing any unnecessary damage or injury to the demised premises, and a power of re-entry for non-payment of rent, or default in observance or performance of the lessees' covenants.

In 1878 the *Dunraven* property and *Hendrewen* property were both worked from two shafts sunk in the *Dunraven* property. There was no separate shaft in *Blaengwynfi*, and the minerals on that property could not be got at from *Dunraven* or *Hendrewen*, except by passing through *Blaenselsig*.

The *Blaenselsig* property was not mentioned in the particulars originally laid before the Plaintiff society. It was referred to for the first time in the course of the negotiations, in Mr. *Lewis's* letter of the 30th of May, and in Mr. *Allott's* of the 4th of June, and in both cases in terms which in the opinion of the Court would lead to the belief that it, like the other properties, was held under a lease. In point of fact, no lease of *Blaenselsig*, nor any binding agreement for a lease, ever existed.

Part of the *Dunraven* property (namely, the colliery and minerals and cottages), and the *Hendrewen* property, was subject to a mortgage, dated the 1st of November, 1876, to the *London and South Wales Coal Company*. The sum secured by this mortgage was originally £70,000, of which £10,000 had been paid off prior to 1878, and £20,000 was paid off by means of the advance made by the Plaintiff society on the 15th of June, 1878, leaving £40,000 remaining on the security, and payable according to the terms of it on the 31st of October, 1881.

Upon these properties the securities created in favour of the Plaintiff society were two. First, a mortgage, dated the 15th of June, 1878, made between *Joseph* of the one part, and *Kidner*, as secretary of the Plaintiff society, of the other part, by which the *Blaengwynfi* property, and so much of the *Dunraven* property as was unencumbered, were mortgaged, by demise in common form, to *Kidner* to secure £15,000 and interest. Secondly, a mortgage, bearing the same date, and made between *Joseph* of the one part and the Plaintiff society of the other part, in the ordinary form of a building society's mortgage, whereby *Joseph*, who was described as a holder of 250 shares in the Plaintiff society, covenanted to repay the £25,000 advanced to him by monthly instalments of £277 1*s.* 8*d.* each, and demised all the properties (subject to the mortgages for £15,000 and £40,000) to the Plaintiff society by way of mortgage to secure £25,000 and interest. This mortgage contained powers to enable the society to enter into

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possession or receipt of the rents and profits of the mortgaged premises, and also to appoint a receiver and to keep the collieries in work as a going concern, and to work the various properties in accordance with the leases under which they were held.

Joseph was entered on the register of members as the holder of the 250 shares mentioned in the mortgage deed, although no formal allotment was made to him, and it appeared not to have been the practice of the society on such occasions to make formal allotments of shares. The terms of repayment mentioned in the second of the two mortgages were in accordance with rule 60.

In addition to these two mortgages, there was a collateral security embodied in three instruments, all dated the 15th of June, 1878.

The first was made between Mrs. *Joseph*, the wife of *Thomas Joseph*, and *David Davis Joseph*, *Mary Louisa Hutchison*, and *Thomas Morgan Joseph* (three of the children of Mr. and Mrs. *Joseph*), of the first part, the trustees of an indenture of settlement of the 28th September, 1876, of the second part; the trustees of an indenture of settlement of the 15th of January, 1877, of the third part; and the Plaintiff society of the fourth part. It recited that Mrs. *Joseph* was entitled for life for her separate use, and that the three children (as regards Mrs. *Hutchison* also for her separate use) were respectively entitled in certain shares in remainder expectant on the death of their mother, to certain funds vested in the trustees respectively, subject to the trusts of the two settlements respectively; and it witnessed that the parties of the first part thereby required and directed the trustees of the settlement to lay out and invest so much of the trust funds as might thereafter come to their respective hands in the redemption and taking up of the securities given to the Plaintiff society, or such part thereof as the trust funds respectively would be competent to redeem.

The second was a memorandum signed by the trustees of the settlement, whereby they undertook and guaranteed that they would invest and apply such portion of the funds which might come to their respective hands for the benefit of Mrs. *Joseph* and her children under or by virtue of the said settlements respectively, in obtaining a transfer of the whole or such part as the

said trust funds would permit, of the securities held by the Plaintiff society upon the property of the said *Thomas Joseph*.

The third was an agreement between *Joseph* of the one part, and the Plaintiff society of the other part, whereby it was recited, amongst other things, to the effect that *Joseph* was entitled to a lease or leases of *Blaenselsig*, to be granted by the trustees of the Marquis of *Bute* and *John Richards Homfray*, and was also the holder of thirteen promissory notes for sums amounting in the whole to £2414 13*s.* 2*d.*; and it was agreed that when and so soon as the lease or leases of *Blaenselsig* should be granted, he, *Joseph*, would deposit the same with the society, to be held by them as collateral security for the repayment of the amount remaining owing in respect of the said advance of £25,000 and interest, and would execute to the society a valid mortgage of the premises to be comprised in the said lease or leases for securing the amount remaining due to the society; and that the society should hold the promissory notes as security or guarantee for the infant children of Mr. and Mrs. *Joseph* giving to the settlement trustees authority to apply their shares of the settled moneys towards payment of the amount due to the society, and the trustees applying such shares accordingly; and in the event of either of the children declining to give such authority, or the trustees not applying such shares in payment as aforesaid, the society might thereupon recover the amount of the promissory notes from the makers thereof.

In pursuance of this last-mentioned agreement, the fourth child of Mr. and Mrs. *Joseph*, on the 22nd of October, 1879, executed a document similar in terms to that of the 15th of June, 1878, signed by Mrs. *Joseph* and three of the children.

Between June, 1878 (when the advance was made), and the 31st of October, 1881 (when the £40,000 became payable under the first mortgage of the *Dunraven* property), considerable payments in respect of the instalments payable to the Plaintiff's society were made by *Joseph*, although not with due regularity, for the monthly payments were repeatedly in arrear. According to the ledger account in the books of the Plaintiff society, there was on the 1st of November, 1881, due on the securities given by *Joseph* to the society the sum of £19,448 7*s.* 2*d.* *Joseph* failed

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to pay the £40,000 which became due on the original mortgage on the 31st of October; and in November, 1881, the first mortgagees threatened to enter into hostile possession of the property subject to this mortgage.

This state of things was brought before a board meeting on the 11th of November, and the minute of the directors was as follows: "The solicitor reported that Mr. *Gray* of *London*, the solicitor for Mr. *Joseph*, who telegraphed to us on the 21st ultimo as to expected early completion of arrangements to pay off our loan, called upon him yesterday, and stated that the negotiations had fallen through, and that the first mortgagees of the colliery and cottages, who want £41,000, which became payable on the 31st of October, were about to enter into hostile possession of the mortgaged premises. Explanations were given as to the other properties on which the society has a first charge, and the most important matter for consideration at present is whether it is desirable that the society should find the £41,000, and take up the first mortgage on the colliery, or should trust entirely to the other securities which are held, which should be ample if the valuations are reliable. Resolved that the solicitor make personal inquiries in *London* as to the action taken by the first mortgagees, and the general position of the negotiations, and that the chairman and secretary be requested to make an early visit to the colliery to investigate the state of Mr. *Joseph's* affairs generally and the working of the colliery, and report to the board at their next meeting."

As has been stated above, the value placed by Sir *William Lewis* on those portions of the *Dunraven* property on which the Plaintiff society had a first charge, and the unincumbered *Blaenselsig* and *Blaengwynfi* properties amounted to £20,680, which was just sufficient to cover the indebtedness of £19,448 7*s.* 2*d.* Mr. *Brailsford*, who had succeeded Mr. *Allott* as chairman, Mr. *Kidner* (the secretary), and Mr. *Webster* (the solicitor) accordingly made investigations and inquiries as resolved upon, and wrote separate reports, which were discussed at the next board meeting on the 17th of November. The most material was that of Mr. *Brailsford's*, which was in part as follows: "*Joseph's* foreclosure of first mortgage of £40,000. I desire to record, for the informa-

tion of my colleagues, that when this matter was referred to myself, Mr. *Kidner* and Mr. *Webster*, I entered upon its consideration with a strong determination not to embark in this undertaking any such large sum as £40,000 if it could possibly and safely be avoided. To all appearance we were sufficiently protected. We had (1) a first charge on land embracing important mineral rights, and valued to us by the agent of the Marquis of *Bute* at £14,800. (2.) A first charge on Mr. *Joseph's* house, and surface right of a large tract of land also valued by Mr. *Lewis* at £5800. (3.) An undertaking to pay over to us in 1883, in reduction of the mortgage of the *Dunraven Colliery*, certain moneys, being the interest held by the trustees of Mrs. *Joseph* and her children in the colliery of *David Davis & Sons*, and which interest was assumed to represent not less than £10,000 as affecting those of the children of age, and upwards of £20,000 as affecting the whole children who, it was represented, would sign as they arrived at age, and meanwhile we held certain promissory notes as collateral security for their fulfilling this undertaking. These three securities represented an assumed value of about £30,000. In addition to these, we had a second mortgage upon the *Dunraven Colliery*, subject to the prior charge of £40,000 to its former owners, the *South Wales Company*." Then further on he said: "The result of communications made to me by Mr. *Kidner* and gathered from Mr. *Gray*, of the firm of *Bell, Brodrick & Gray*, whom we interviewed with Mr. *Joseph* in *London*, was as follows: (1.) As to this security, it was land on which no shaft had been sunk, and which at present we could have no access to except by incurring the cost of sinking. It is intended to work it from *Dunraven Colliery*; but at present Mr. *Joseph* has not acquired a lease of minerals lying between it and *Dunraven*. Except, therefore, held with *Dunraven*, it did not appear that there was any immediate realisable value in this security. (2.) This security is available for immediate sale; and, allowing for contingencies, it could not safely be estimated to realise more than £3000. (3.) This security has reference to a valuable colliery which even in the recent depressed state of the trade has realised good profits. Mr. *Joseph's* interest last year amounted to upwards of £2000. It is the income from this source which has served for the

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personal requirements of Mr. *Joseph's* family during the period referred to in Mr. *Kidner's* report when the *Dunraven Colliery* has not been remunerative. The value of the interest of Mr. *Joseph's* children in this property was said to be over £20,000, and as it appeared that according to our security this had to be paid out and invested in the *Dunraven Colliery* in 1883, I was disposed to stand upon this security rather than raise £40,000 to rescue the property from the first mortgagees. Mr. *Gray*, however, pointed out that if we allowed the first mortgagees to foreclose, this security was perfectly valueless to us. The undertaking of the children of Mr. *Joseph* and their trustees went only to invest the money in *Dunraven*, and if this fell into the hands of the first mortgagees and became their absolute property we had no further value in it. This view, which was confirmed by Mr. *Webster*, was a complete surprise to me. Mr. *Webster* read to me the case which at the time the loan was granted he submitted to counsel for advice and his opinion thereon. I note, however, that neither in the case or opinion is any reference made to the contingency which has arisen, *i.e.*, the possibility of the mortgagees of *Dunraven* being able to foreclose before the period at which the undertaking of the children and trustees under Mr. *Joseph's* settlement comes into operation."

Mr. *Kidner's* report contained the following statements as to *Joseph's* financial position: "The colliery has lost money every year, probably £2000 or £3000, besides interest on capital £3000—say £5000 altogether. This accounts for Mr. *Joseph's* position. During 1881 it will about balance; but next year I confidently anticipate a large profit; Mr. *Joseph* expects £30,000, or an average of 4*s.* per ton, which would require the price of coal to be 10*s.* I think it not at all improbable that this price will be generally obtained at midsummer next; but allowing for the first six months, and for contracts running afterwards, I think £15,000 profit would be a reasonable estimate for 1882. With a smaller output and less favourably circumstanced as to management, Mr. *Joseph* assures me that the colliery made £150,000 profit in three years, when the limited company had it, 1873–5. Mr. *Joseph's* books are not complete or written up in a manner to enable me to ascertain his financial position . . . . Mr. *Joseph*

and his solicitor say a large sum is due for arrears of royalties, altogether about £14,000, against which however there are short workings, which he hopes to work up to a good amount. He says the arrears will not be pressed, as his case is one among many others just now in *South Wales*, owing to the bad times, and they will be liquidated gradually."

The proposals made by Mr. *Joseph* were, according to Mr. *Brailsford's* report, as follows: "(1.) To grant an absolute transfer of the wife and children's interest in *Davis's Colliery*, or execute any security which should secure this property to us. (2.) In addition to the present charge upon his house, to give an undertaking to execute a bill of sale upon his furniture, &c., which Mr. *Kidner* thinks would be worth more than £1000. (3.) To give us a mortgage over his lease and tenant-right of a farm, which he estimates at £2000, and undertakes to give a bill of sale over stocks to the value of £1000. (4.) To appoint Mr. *Kidner* on our behalf as receiver, with authority to pay over to us all colliery income beyond current working expenses. (5.) To give us authority at once to transfer to the School Board and receive £1980 in payment of a piece of land agreed to be sold for a public school. (6.) The loan to be for 12 months, £5000 being given us as a commission or bonus, and the total sum to bear interest at 10 per cent. Any sum received from Mr. *Joseph* to be credited in reduction of principal and interest."

Mr. *Brailsford's* report added: "In the course of conversation, Mr. *Joseph* named that he had another small colliery (the *Avon*) which was charged with a mortgage of £8000. I omitted to name that this should be charged to and included in our security; but am sure Mr. *Joseph* will assent to it."

The following resolutions were according to the minutes passed upon these reports: "After discussion it was unanimously resolved that the sub-committee be authorized to advance such sum (£41,000 or thereabouts) as may be necessary to take up the first mortgage of £40,000 upon Mr. *Joseph's* property in *South Wales*. Resolved, that Mr. *Bennett* be added to the sub-committee to meet Mr. *Joseph* and arrange with him as to the securities which he shall be required to give upon his furniture, leasehold farm, the *Avon Colliery*, and other property, and especially

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Mrs. *Joseph's* interest in *D. Davis & Sons'* partnership. Mr. *Brailsford* raised a question as to whether the directors were before aware of the uncertainty of our hold upon the interest in *D. Davis & Sons* in the event of the colliery passing into other hands. At the request of the chairman, the secretary reported that he had called upon Mr. *Holdsworth* to inquire as to the society having an overdraft of £35,000 or £40,000 for an advance which they contemplated making, which may be required within a few days. He said he would submit the matter to his directors on Wednesday next, or call a special meeting on Saturday or Monday if desired. But they would require the key of the deed safe and a list of the securities, which should be given up when the advance was repaid. A resolution authorizing this to be done was also necessary. Mr. *Webster* drew up the following, which was agreed to unanimously. Resolved, that in consideration of the *Sheffield and Hallamshire Bank* granting to this society a special advance of £40,000, the bank be and they are hereby authorized and empowered to retain the deeds of the society (which are now deposited with them for safe custody) as a security for any overdraft."

In pursuance of these resolutions £41,000, was on the 22nd of November, 1881, applied by the Plaintiff society in paying off the principal and arrears of the interest due on the first mortgage, of which sum £40,000 was borrowed from the bankers of the society.

It was not alleged that the directors in obtaining this loan exceeded the limits placed by the statute or by the rules of the society on the power of borrowing.

By way of security for the repayment of the £41,000, *Joseph* signed an agreement dated the 21st of November, 1881, of which the material stipulations were as follows: (1.) In consideration of the sum of £41,000 to be advanced by the society in payment of the moneys secured by the said indenture of the 1st day of November, 1876 (which loan was to be repaid by *Joseph* on or before the 20th day of November, 1882), *Joseph* agreed to pay to the society interest at 10 per cent. per annum on the said sum of £41,000 from the date of its payment up to the date when it should be repaid to the society. (2.) *Joseph* contracted to sell

the schools referred to in the said 6th schedule to the School Board of *Ystradyfodwg* for the sum of £1980 or thereabouts, and was forthwith to complete the sale, and the purchase-moneys were to be received by the society. (3.) *Joseph* was to obtain with all due diligence a lease of the *Blaenselsig* minerals on the best possible terms, and upon demand to charge the lease when obtained in favour of the society as a collateral security. (4.) *Joseph* was within one month from the date of the agreement to execute to the society a mortgage upon all his estate and interest in the *Avon Colliery*. (5.) The society was to be at liberty to appoint as their agent or representative their secretary, *Kidner*, who, if he thought fit, was to keep upon the *Dunraven Colliery* a clerk, who was at all times to be permitted to have access to all parts of the said colliery and to the accounts, books, and vouchers of the concern, in order to obtain from time to time the fullest possible information as to the value of the security or the result of the working of the colliery, and *Joseph* was to pay *Kidner's* charges and the clerk's salary, not exceeding £200 per annum. (6.) *Joseph* was to charge in favour of the society the lease of a farm containing ninety-three acres or thereabouts, situate in the vale of *Glamorgan*, and in the event of the secretary certifying that the security was depreciating in value, or that the colliery was being worked at a loss, *Joseph* was to execute to the society a bill of sale on the farming stock on the farm. (7.) Until the moneys then agreed to be advanced were repaid, *Joseph* was not to draw as salary or otherwise any moneys from the *Dunraven Colliery*, except such as might be required for the efficient working thereof.

In that agreement nothing was said as to Mr. *Joseph* taking any further shares in the society, nor was the advance of £41,000 purported to be made to him as a member of the society; but in the register of members he was entered as having become in December, 1881, an advanced member in respect of 410 additional shares. The completion of this portion of the transaction was reported to a board meeting on the 28th of November, 1881, and was approved.

Subsequently, on the 21st of April, 1882, the first mortgagees (the *London and South Wales Coal Company*) executed a transfer to the Plaintiff society of their mortgage debt and security, and

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on the same date Mr. *Joseph* executed a mortgage in favour of the society of the *Dunraven*, *Hendrewen*, and *Blaengwynfi* properties. This security did not take the form of a building society mortgage, but that of a mortgage to secure the payment on the 21st of November, 1882, of £46,000, and in addition to the powers usually contained in such a deed, it comprised clauses enabling the society to work the collieries, and to appoint *Kidner* as their agent and representative there, for the purpose of obtaining information as to the value of the security and the working and management of the mines.

Mr. *Joseph's* affairs did not, however, prosper. He made several attempts to dispose of the collieries, but failed. He was unable to work them at a profit, and ultimately, early in July, 1882, he became unable to pay the wages of the men employed at the colliery. He was largely in arrear with the payment of the royalties reserved by the *Dunraven* lease and with the wages of his miners; and on the 23rd of August, 1882, Lord *Dunraven*, the landlord, distrained in respect of them on the loose plant of the collieries. On the 25th of August Mr. *Joseph* commenced proceedings for the liquidation of his affairs, and a receiver was appointed.

Under these circumstances, the directors, at a meeting held on the 31st of August, sanctioned an arrangement under which the distress was not to be acted on for twenty-eight days from that date, on a payment being made by the society to Lord *Dunraven's* agent of £1000 a week; that Mr. *Barber*, the receiver in the liquidation, should take or retain possession on behalf of the mortgagees—*i.e.*, the plaintiff society—and should advance the money to pay the miners their arrears of wages, the mortgagees indemnifying him in the event of the assets not covering the wages.

In respect of these arrears of wages sums amounting to £2692 19*s.* 10*d.* appeared to have been ultimately paid by the directors.

On the 28th of September another board meeting was held, at which it was reported that £2000 had been paid on account of royalties, and £1000 on account of wages, and that the colliery was being carried on by the receiver in the liquidation, as agent

for the mortgagees. On the 7th of October the board sanctioned the appointment of a manager of the collieries, and a payment of a further £1000 on account of royalties. In the same month the society took possession of the colliery, and Mr. *Ralfe* was appointed manager; a report made by him as to the future management of the colliery was adopted, and the secretary was "instructed to convey to him authority to dismiss all unnecessary parties, and appoint others when necessary."

Under these and other resolutions subsequently passed large sums were subsequently expended by the society in carrying on the colliery, and in payment of arrears of royalties, and royalties accruing due to the landlords. It was stated by the liquidator that, according to the books of the plaintiff society, these securities represented assets of the society to the amount of £117,000 and upwards. The workings were not successful, and a very large net loss was thereby occasioned to the society, in addition to which there was an expenditure on capital account of £7930 for engines, boilers, machinery, a new fan, and various other matters. No lease was obtained of the *Blaenselsig* property, and all attempts to sell the other properties failed. The evidence shewed that the failure was due to the absence of a lease of *Blaenselsig*. Great embarrassment was thus occasioned to the society, and this led to the presentation of a petition by themselves, upon which an order was made on the 22nd of July, 1886, that the society should be wound up voluntarily under the supervision of the Court. After the commencement of the liquidation, the lessor of the *Blaengwynfi* property recovered possession of that property, on the ground of the breach of the covenant to work the mine.

Under these circumstances, the present action was brought on the 25th February, 1887, and by their statement of claim the Plaintiffs made the following, amongst other allegations:—

Paragraph 7. "The *Hendrewen* minerals adjoin the *Dunraven Colliery*. The *Dunraven Colliery* and *Hendrewen* minerals are separated from the *Blaengwynfi* minerals by a tract of minerals (hereinafter called the *Blaenselsig* minerals) belonging to the Marquis of *Bute* and Messrs. *Homfray*. The *Dunraven Colliery* had

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for some time past been worked by means of two pits. There was no separate pit for working the *Hendrewen* minerals, but it was possible to work them by instroke from the pit belonging to the *Dunraven Colliery*. No pit had been sunk for working the *Blaengwynfi* minerals, and they had not been worked. The said *Thomas Joseph*, at the time of his application to the society, was in treaty with Mr. *Lewis*, the agent for the Marquis of *Bute*, and Messrs. *Homfray*, for a lease of the *Blaenselsig* minerals. It was of the greatest importance that such lease should be granted. The *Dunraven Colliery* had been worked, and the main engines planes laid out with a view to the working of the *Dunraven* and *Blaenselsig* minerals at a future date as a single undertaking. If a lease of the *Blaenselsig* minerals could not be obtained, a large outlay would be required in altering the roadways in the *Dunraven Colliery*, and certain portions of the minerals could only be worked at an increased cost. It was, moreover, necessary to acquire the *Blaenselsig* minerals to enable the *Blaengwynfi* minerals to be worked by instroke from the *Dunraven Colliery*, through the *Blaenselsig* minerals. The cost of sinking a pit to work the *Blaengwynfi* minerals with the necessary headings has been lately estimated at £20,000."

Paragraph 18. "No proper valuation was ever made by the surveyor of the society or anyone else on behalf of the society. The said Mr. *Lewis* never was instructed by the directors or any one else to act on behalf of the society and to protect its interests in the matter of the said loan, and he did not do so. He never made any proper valuation of the proposed securities. He was, moreover, the agent of the Marquis of *Bute* and Messrs. *Homfray*, owners of the *Blaenselsig* minerals. He was also a personal friend of the said *Thomas Joseph*. On both grounds he was desirous that the loan should be carried through, and throughout acted as an advocate of the loan."

Paragraph 19. "Even if the letters of the 11th and 27th April, 1878, had been proper valuations, they would not have justified the advance, inasmuch as the said Mr. *Lewis* proceeded on the assumption that the said *Thomas Joseph* was entitled to the residence called *Tydraw*, with the 900 acres and tipping right over 600 acres, as described by him, and also to a lease

of the *Blaenselsig* minerals, and that a valid security would be given over the trust funds comprised in the said settlements."

Paragraph 20. "The said *Thomas Joseph* had not entered into any binding agreement for a lease of the *Blaenselsig* minerals, as the directors well knew, and he was never able to procure the owners of the property to enter into any such agreement."

Paragraph 40. "Many efforts were made by the directors before the winding-up to find a purchaser for the *Dunraven Colliery* and other properties comprised in the society's securities, but without success. The owners of the *Blaenselsig* minerals have not entered into any binding agreement to grant a lease, and they decline to accept the society as lessees; but they have expressed their willingness to grant a lease to a person approved by them as nominee of the society upon the terms that £6000 shall forthwith be paid to them, representing dead rent from the date when the said *Thomas Joseph* first made an offer for a lease. The proposed lease also provides that the lessee shall within two years sink a winding pit, the cost of which has been estimated at £20,000. The terms of the proposed lease are in other respects onerous. The society is unable to procure any person to accept the said lease as the nominee of the society. Without such lease the properties comprised in the society's securities are unsaleable. In any case, they could be sold only at an enormous loss to the society."

All the Defendants appeared in the action except *Allott* and the legal personal representative of *Henry Loxley*, deceased, neither of whom put in any defence, and as against them the action came on upon motion for judgment in default of pleading. All the other Defendants put in defences, some of which were separate defences; but the case made by them all was in substance the same, and, stated shortly, it was that they left the active conduct of the loan to *Allott* as the one of their number who was most conversant with colliery business and most competent to deal with it; that they exercised their judgment with *bona fides* and to the best of their ability upon the information and materials submitted to them by *Allott*, and acted, as they were entitled to do, upon the reports of Sir *W. Lewis*, a surveyor of great experience in colliery matters and of undoubted eminence

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in his profession; that they honestly believed the security to be an ample one; that they had been guilty of no such neglect or default as to deprive themselves of the protection afforded them by the rule of the society, rule 14; and that in accordance with rule 26 they had instructed their solicitor to investigate, and were entirely unaware of any defection in the title.

The action was tried on oral evidence, and several of the Defendants were called as witnesses and gave evidence to the effect that they did not know that *Joseph* had no lease nor any binding agreement for a lease of the *Blaenselsig* minerals, but that they believed that he had such an agreement at the time he executed the securities for the loan, and, moreover, that they were unaware that he was in arrear for rent. Several surveyors of repute gave evidence as to the position and competence of Sir *William Lewis*, and Sir *William Lewis* himself was called as a witness, and gave the following evidence as to the *Blaenselsig* minerals: "Mr. *Joseph* had opened negotiations for the minerals under *Blaenselsig*, and his offer had been accepted by Lord *Bute* and Mr. *Homfray*, the owners, and I regarded Mr. *Joseph* as having a claim to that property though the lease was not granted. The exact position of matters was very fully explained to Mr. *Allott*. Mr. *Joseph* could have had a lease of the *Blaenselsig* minerals, if he had required it on the terms proposed." The liquidator of the society was also examined as a witness, and in answer to questions put to him in cross-examination, he said: "I do not suggest that the Defendants acted otherwise than in good faith. I do not think they intended to do wrong. They may have been negligent, and relied too much on others." The only other material portions of the evidence will be found in the judgment of the Court.

Rigby, Q.C., *Buckley*, Q.C., and *Theobald*, for the Plaintiffs:—

The losses which the society has sustained have happened through the neglect or default of the directors. There are three matters of complaint in this action—the original advance of £25,000 in 1878, the advance of £41,000 in November, 1881, and the payments for the preservation, maintenance, and working of the colliery.

1. The original advance was *ultrà vires* both as to the *Building Societies Act* of 1874 and the rules of the society. The Act in sect. 13 and the rules in rule 1 alike provide that advances from the funds of the society are to be made on security of "freehold, copyhold, or leasehold estate." These are the only investments contemplated; and as the directors have gone outside the Act and rules and have taken a security which included property neither freehold, copyhold, nor leasehold—*i.e.*, personal undertakings and promissory notes—the whole transaction is tainted and vitiated.

Again, the leasehold property which they took was of a kind upon which it was never intended that the funds of the society should be advanced.

The rules (particularly rules 11, 13, 25, 48, 50) shew that the property on which it was contemplated that advances were to be made was building land—the sort of property which the permanent surveyor, by whom, except in certain events which did not happen, all surveys were to be made, was competent to value. What the directors took was a going concern, and valued as such. It was a colliery which their officer was incompetent to value, and which was in itself a security of a highly speculative character dependent upon contingencies which it was difficult to calculate. It was, in fact, not so much a leasehold security as a security upon the expectation that the person working under the lease had of an output; for the lease as a lease was not only valueless in itself, but by reason of the dead rent and covenants might be very burdensome.

But even if it was within the powers of the directors to accept this class of property as a security, they acted with such negligence and recklessness as to render themselves liable on that ground: *Charitable Corporation* v. *Sutton* (1); *Evans* v. *Coventry* (2); *Overend & Gurney Company* v. *Gibb* (3). It was their duty to obtain a valuation from an independent valuer, and to see that he was furnished with proper instructions. They were bound to act with all reasonable and proper prudence, and to give to the person who was going to advise them reasonable means of forming an opinion.

(1) 2 Atk. 400. (2) 8 D. M. & G. 835. (3) Law Rep. 5 H. L. 480.

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They gave no instructions whatever to Sir *William Lewis*, and this omission amounts to negligence, especially as he was in reality the borrower's valuer and friend, and throughout acted in his interest and advocated the loan: *Fry* v. *Tapson* (1).

[STIRLING, J.:—Has that decision ever been applied to a director of a society like this?]

Directors must equally with trustees bring to the discharge of their duties proper prudence and care. They are equally bound to give proper instructions, and for this purpose there is no difference in position between an ordinary trustee and the managing director of such a society as this, although it may not be so as to every duty of a trustee, *e.g.*, that of calling in a debt at once, or the duty of leaving a margin of value of a certain amount.

2. If the first advance was *ultrà vires*, the subsequent advance of £41,000 was *ultrà vires* also, and cannot be justified as an exercise of an implied power to do what is consequential on or necessary for the salvage or protection of a security already taken under the rules: *Small* v. *Smith* (2). But anyhow the subsequent advance was *ultrà vires*, for it was not an advance to a member in accordance with the rules, nor was it an investment of the funds of the society, for the money advanced was borrowed.

3. The expenditure on rent and wages was also unauthorized by the rules and beyond the powers of the directors: *Small* v. *Smith*.

4. The other directors are in no better position than *Allott*, for they delegated to him entirely duties which they ought themselves to have performed—they, in fact, constituted him their general agent, and had, at all events, such constructive notice as should have put them upon further inquiry, and are liable accordingly.

Hastings, Q.C., Sir *H. Davey*, Q.C., and *Chadwyck Healey*, for all the Defendants except *Allott*, *Brailsford*, and the respective representatives of *Henry Loxley* and *Leader*:—

By the Act of 1874, and under the rules of the society, one of

(1) 28 Ch. D. 268. (2) 10 App. Cas. 119.

the objects of the society was to lend money upon the security of legal or equitable mortgages of leasehold property without any fetter, restriction, or qualification as to its character, and the directors made the first advance upon a leasehold estate, which was none the less leasehold because it included minerals, or because the getting of the minerals is a business: *Blackburn District Benefit Building Society* v. *Ward* (1). Moreover, if the leaseholds in the security were of sufficient value—and according to reports upon which the directors were justified in acting, they were of ample value—the inclusion of personal estate, such as the interests as Mrs. *Joseph* and her children as a collateral security does not affect the validity of the original security in any way: *Re Pearson* (2). At all events, if the directors were mistaken as to the rules, their mistake was an innocent one, unaccompanied by fraudulent or suspicious conduct or motive, and they ought not to be held answerable for any loss which may have arisen through it: *London Financial Association* v. *Kelk* (3); *Ireland* v. *Livingston* (4).

Learoyd v. *Whiteley* (5) was not a decision that the security was not within the powers of the trustees, but turned upon their conduct, and it was said by *Halsbury*, L.C., that they might well be able to defend themselves upon the ground that they had selected a careful person, and had acted upon skilled advice; "but that was what they did not do," in that case.

Here the duty of the directors was to form their judgment upon the security; the mode in which it was to be carried out was left to the solicitor. The directors did honestly form a judgment upon the security, and did so upon sufficient materials duly placed before them. There was, therefore, no negligence as to the first transaction.

Then, if the first advance can be justified, the sums subsequently advanced and paid cannot be treated as isolated transactions, but must be regarded as consequent upon a security within the powers of the directors, and which it was their duty to adopt all reasonable means to preserve from destruction. On

(1) Unreported [1882 B. 56].
(2) 51 L. T. (N.S.) 692.
(3) 26 Ch. D. 107, 144.
(4) Law Rep. 5 H. L. 395, 416.
(5) 33 Ch. D. 347; 12 App. Cas. 727.

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the 31st of October, 1881, the £40,000 had become due to the *South Wales Company* upon their prior charge on the *Dunraven* property, and they threatened that if it was not paid by *Joseph* they would enter into possession or foreclose. The question then for the directors was whether they had better pay off the first mortgagees or run the risk of foreclosure, and after full discussion, the directors, on sufficient materials and in good faith, formed their judgment, and in the exercise of their discretion decided to pay it off. They entered *Joseph* on their books as a member in respect of 410 shares of £100 each, and having full borrowing powers under the Act, they utilised them for this purpose, as they were entitled to do. There was a prospect of the loan being paid off within twelve months, and the transaction was one growing out of, and "a proper consequence of the relation constituted between mortgagor and mortgagee," or "between a first mortgagee and a second mortgagee," and was done under "a potential necessity" for the protection of the existing security: *Small* v. *Smith* (1); *Royal Bank of India's Case* (2).

Then as to negligence. In order to fasten on the directors such constructive notice as would convict them of culpable negligence, it is said that they constituted *Allott* their general agent; but they did not do so. He was never their agent for the purpose of making admissions or receiving notice. All that they did was to depute their chairman, who was specially conversant with property of this character, to go down and inspect and report; and no charge of negligence can be founded on that. They could not all inspect the collieries. It is said that Sir *William Lewis* was the borrower's valuer. But this is not so. It is true that he was one of the five who were suggested by Mr. *Joseph* as all competent and practising in the locality; but he is a surveyor of the highest eminence, second to none in his special knowledge of Welsh collieries, and he had no personal interest in the matter beyond the moderate amount of his fee.

Lastly, the directors of societies like these are not trustees in the ordinary sense of the term. They are commercial men managing a business for the benefit of themselves and the other

(1) 10 App. Cas. 119, 133. (2) Law Rep. 4 Ch. 252.

members. They cannot of course act *ultrà vires*; but they have a wide discretion, and, so long as they act *intra vires*, and with good faith—and there is no question here of their good faith—mere imprudence or want of judgment will not render them liable, nor will anything short of a strong and clear case of misfeasance in respect of matters in which they personally took part: *In re Faure Electric Accumulator Company* (1); *Overend & Gurney Co.* v. *Gibb* (2); *London Financial Association* v. *Kelk* (3); *In re Denham & Co.* (4); *Leeds Estate Building and Investment Company* v. *Shepherd* (5); *Joint Stock Discount Company* v. *Brown* (6); *In re Reese River Silver Mining Company* (7). But even if the directors have been guilty of negligence the *Statute of Limitations* runs from the date of the act of negligence, and is an absolute bar to the relief claimed against them; *Knox* v. *Gye* (8); *Metropolitan Bank* v. *Heiron* (9).

Bigham, Q.C., and *Upjohn*, for the Defendant *Brailsford*:—

The addition of the collateral security did not affect the validity of the first loan. In *Re Pearson* (10), where there was a power to invest in real securities, and a trustee had, upon the advice of the solicitor and upon a favourable report and valuation by respectable surveyors, lent trust money upon mortgage of lands and brickworks and plant, he was held not to be liable to make good the loss; and there is no distinction between a brickyard and a colliery. If the first advance was not *ultrà vires*, the subsequent advances and payments must be held good also, and the question of negligence does not arise.

Then, as the transactions complained of are not *ultrà vires*, the directors cannot be made liable unless fraud or *crassa negligentia* can be proved against them personally.

The cases are divisible into two classes: (1) Where there has been such proof and the directors have been held liable: *Rance's*

(1) 40 Ch. D. 141, 150-2.
(2) Law Rep. 5 H. L. 480.
(3) 26 Ch. D. 107, 146.
(4) 25 Ch. D. 752.
(5) 36 Ch. D. 787.
(6) Law Rep. 3 Eq. 139; Ibid. 8 Eq. 381.
(7) W. N. 1867, p. 139.
(8) Law Rep. 5 H. L. 656.
(9) 5 Ex. D. 319.
(10) 51 L. T. (N.S.) 692.

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Case (1); *In re National Funds Assurance Company* (2); *Marzetti's Case* (3); *In re Oxford Benefit Building and Investment Society* (4); *Leeds Estate Building and Investment Company* v. *Shepherd* (5); (2) Where there has been no such proof, and the directors have been held not to be liable: *Land Credit Company of Ireland* v. *Lord Fermoy* (6), which shews that directors are justified in delegating a portion of their business to some of their number: *Pickering* v. *Stephenson* (7); *In re Denham & Co.* (8); *London Financial Association* v. *Kelk* (9); *Studdert* v. *Grosvenor* (10).

W. Pearson, Q.C., and *Levett*, for the representatives of *Leader*:—

Leader ceased to be a director in March, 1881, so he can only be liable, if at all, in respect of the first loan.

This is not a question of breach of trust, but of principal and agent. The rules of the society—rules 2, 10, 11, 17, 24, 26, 47, 49—shew that the business is to be conducted by separate officers, with a separate duty and a separate liability. The directors cannot be charged with the breach of any duty which came within the province of the solicitor, who was not acting on behalf of the directors, but acting under the rules on behalf of the society.

It was not beyond the powers of the directors to lend upon these securities. We rely upon the 25th section of the *Building Societies Act* of 1874 (37 & 38 Vict. c. 42), the rules of the society, clauses 19 (a), and 47, and the decisions in *Re Pearson* (11) and *Whiteley* v. *Learoyd* (12). No *mala fides* is alleged against the directors, and if they have exceeded their powers the Plaintiffs must prove that the mandate delivered to them as agents was clear and unambiguous, for the Court will not visit on innocent agents a loss brought about by the want of precision and uncertainty in

(1) Law Rep. 6 Ch. 104.
(2) 10 Ch. D. 118.
(3) 28 W. R. 541.
(4) 35 Ch. D. 502.
(5) 36 Ch. D. 787.
(6) Law Rep. 5 Ch. 763.
(7) Law Rep. 14 Eq. 322, 341.
(8) 25 Ch. D. 752.
(9) 26 Ch. D. 107.
(10) 33 Ch. D. 528.
(11) 51 L. T. (N.S.) 692.
(12) 33 Ch. D. 347; 12 App. Cas. 727.

the directions of the principal: *Ireland* v. *Livingston* (1); *Marzetti's Case* (2); *Stone* v. *Cartwright* (3); *Bromley* v. *Coxwell* (4); *Rossiter* v. *Trafalgar Life Assurance Association* (5); *Story* on Agency (6). However, the *Statute of Limitations* is a bar as it ran from the date of the act of negligence whether the agency was a general agency, or an agency for a particular purpose: *Whitehead* v. *Howard* (7); *Brown* v. *Howard* (8); *Short* v. *M'Carthy* (9); *Howell* v. *Young* (10); *Smith* v. *Fox* (11); *In re Hindmarsh* (12).

As to the measure of damages, if any, they referred to *Cassaboglou* v. *Gibb* (13).

Rigby, in reply:—

This is not a case of principal and agent. There is a very heavy deficit, and the liquidator is suing under an order of the Court, mainly, if not entirely, in the interests of the creditors of the society, whom he represents and who include of course those persons who deposited moneys with the society. It has been contended that the society was a trading society dealing with property with a view to making exceptional profits; but it is clear that the Act of Parliament under which it was constituted does not contemplate anything in the nature of trade. The loan was absolutely *ultrà vires*: *Ashbury Railway Carriage and Iron Company* v. *Riche* (14); *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (15); *Small* v. *Smith* (16). All the moneys of the society were trust funds in the hands of the directors for special purposes. It was, in fact, an investing and lending society regulated by the rules framed under the Act of Parliament; and it cannot be said that the advance made on the collieries was an investment upon leaseholds within the meaning or purview of the Act of Parliament or the rules of the society. The directors being trustees or *quasi* trustees, the remedy against them is not barred by the *Statute of Limitations*.

(1) Law Rep. 5 H. L. 395, 417.
(2) 28 W. R. 541.
(3) 6 T. R. 411.
(4) 2 Bos. & P. 438.
(5) 27 Beav. 377.
(6) Sects. 74, 201.
(7) 2 Brod. & B. 372.
(8) Ibid. 73.
(9) 3 B. & Al. 626.
(10) 5 B. & C. 259.
(11) 6 Hare, 386.
(12) 1 Dr. & Sm. 120.
(13) 11 Q. B. D. 797.
(14) Law Rep. 7 H. L. 653.
(15) 9 App. Cas. 857.
(16) 10 App. Cas. 119, 127–129.

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As against the Defendant *Allott* and the Defendants the representatives of *Henry Loxley*, deceased, the action comes on upon motion for judgment in default of pleading, and under Order XXVII., rule 11, such judgment is to be given against them as upon the statement of claim, the Court or a Judge shall consider the Plaintiffs entitled to. I shall accordingly postpone the consideration of the relief to be given against them until I have disposed of the case as against the Defendants who appear.

The transactions impeached in the action divide themselves into three heads: first, the original advance of £25,000 in 1878; secondly, the advance of £41,000 in November, 1881; and, thirdly, the expenditure for the preservation, maintenance, and working of the colliery. Each of these matters involves somewhat different considerations, and I propose to deal with them separately.

The original advance of £25,000 is attacked on the ground that it was beyond the powers of the society, or at all events of the directors, and, further, that it was made so recklessly and improvidently as to render the directors liable in respect of it, even if it was within their powers. First, then, was the advance beyond the powers of the society? The object of the society is to make advances "upon security of freehold, copyhold, and leasehold estate." It is said that the advance of £25,000 was not made on such security, but on the security of the colliery and mines carried on by Mr. *Joseph*. In fact, however, the *Dunraven*, *Hendrewen*, and *Blaengwynfi* properties were held under leases and constituted leasehold estate. The leases included minerals, which were to be worked and got by the lessees. The property offered as security was, therefore, to some extent of a wasting nature, and its value was affected by its being used for the purposes of the colliery business carried on by *Joseph*. Those were matters fit and proper to be considered in determining what amount should be advanced on the security of the leasehold property; but, in my judgment, it cannot be said that the society was precluded by reason of the existence of those circumstances from making any advance, however small, on mortgage of it; and I am therefore of opinion that this part of the

transaction was not beyond the powers of the society. Whether the sum advanced exceeded the proper amount is a matter which will be considered hereafter.

It was next said that the advance was not made exclusively on the security of leasehold estate, but was made partially on the security of the interests of Mrs. *Joseph* and her children in the funds held on the trusts of the two settlements of the 28th of September, 1876, and the 15th of January, 1877. It was said that those interests constituted an essential and integral part of the securities taken by the Plaintiff society, and that reliance was placed upon them by the directors; and it was contended that the inclusion of those interests in the securities vitiated the whole transaction—that, in fact, the inclusion of any personal element in the security would vitiate such a transaction.

If this contention were well founded, then it would seem to follow that the inclusion in a building society's mortgage of a personal covenant by the mortgagor for repayment of the advance, and reliance placed by the officers of the society on the solvency of the mortgagor, might equally vitiate any transaction of which those were elements. Yet it was not disputed in argument, and in my judgment properly, that a building society making an advance to a member on the security of freehold, copyhold, or leasehold estate, might take from him a personal covenant for payment of what might be due from him to the society; and I think that the officers of the society might, to a certain extent, and for certain purposes, rely on the solvency of the mortgagor. For example, an action on the covenant of a solvent borrower affords an effectual and comparatively speedy and inexpensive mode of recovering what is due, and may be the means of avoiding the delay, costs, and liability incident to remedies (such as foreclosure, sale, or entry into possession) available only against the subject-matter of the security. If the circumstances of the borrower are such that his personal covenant is without value, the building society may, in my opinion, secure a like advantage by means of the personal guarantee of a third party or a charge on some readily available pure personal estate. The benefit so obtained must, however, be purely collateral, and the validity or propriety of the transaction is to be tested as if no

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such ingredient entered into it. If there be no freehold, copyhold, or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society, and invalid; but where, as here, the borrower offers as security such estate to a substantial extent, an advance is within the powers conferred by the Act of 1874, and the question for the officers of the society to determine is what amount may properly be advanced, and that question they must decide having regard solely to the nature and value of the freehold, copyhold, or leasehold estate offered to them, and without reference to the solvency of the borrower or the worth of any personal estate he may be willing to throw in by way of security.

Next, it is to be considered whether the transaction, though within the powers of the society, was within the powers of the directors; and here it will be convenient to commence with some general observations as to the position and duties of directors of such societies.

It has been laid down—and I take it to be established law—that directors of trading companies are not trustees in the sense in which that term is used with reference to settlements or wills. The question is discussed and the authorities are considered in the recent case of *In re Faure Electric Accumulator Company* (1), and it is sufficient for me to refer to the judgment of Mr. Justice *Kay* at pages 150 and 151 of the report. It is said, however, that the rules there laid down refer to trading companies incorporated under the *Companies Acts*, and that the directors of building societies incorporated under the *Building Societies Act*, 1874, are in a different position. Building societies, according to sect. 13 of the last-mentioned Act, are established "for the purpose of raising by the subscriptions of the members a stock or fund for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold estate." It has been repeatedly pointed out that the objects of such societies are twofold—on the one hand, to assist some of the members to obtain advances on the security of their property; on the other

(1) 40 Ch. D. 141.

hand, to assist others to obtain a high rate of interest on their money. Thus, in the judgment in *Fleming* v. *Self* (1), in which Lord *Cranworth* elaborately explained the nature and objects of such societies as were established under the Act 6 & 7 Will. 4, c. 32, he says: "In truth the whole scheme is but an elaborate contrivance for enabling persons having sums for which they have no immediate want to lend them to others at a very high rate of interest;" and in the case of *In re Guardian Permanent Benefit Building Society* (2), Sir *George Jessel*, Master of the Rolls, says of the same Act, that its object was "to assist some of the members to obtain freehold or leasehold property, and some a high rate of interest." Similar observations apply to societies incorporated under the Act of 1874. These societies, therefore, in one aspect of them, have for their object the acquisition of gain in the shape of a high rate of interest by the investing members; and the directors ought not, in my opinion, any more than the directors of companies formed under the Act of 1862, to be held liable upon the rules—which Lord Justice *James* in *Marzetti's Case* (3), said were, in his opinion, too strict rules—laid down by the Court of Chancery with respect to the duties of trustees of wills and settlements where the preservation of the trust funds is the primary object.

Some of the observations of the other learned Judges who took part in the decision of *Marzetti's Case* also deserve consideration. The present Master of the Rolls says: "The question is whether Mr. *Marzetti* has been guilty of such negligence as would make him liable in an action. Mere imprudence is not such negligence. Want of judgment is not. It must be such negligence as would make a man liable in point of law. Mr. *Marzetti* has been guilty of not making those inquiries which a person of ordinary care in his position would have made." And Lord Justice *Cotton* says: "Trustees are liable, whatever trouble they take, if the fund in their care goes not according to the trust. Opinions of counsel, *bona fides*, or care do not protect them. Now, directors are confidential agents with the liabilities of trustees, but they have a large discretion, and if they act *bonâ fide* they are

(1) 3 D. M. & G. 997, 1015. (2) 23 Ch. D. 440, 458.
(3) 28 W. R. 541, 543.

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relieved, and are not liable for want of judgment or error if they make a payment which is in fact not for the purposes of the company."

In the exercise of this large discretion, the directors may, as I conceive, properly make advances on classes of securities forbidden to ordinary trustees. One rule which is binding on ordinary trustees is thus stated by Lord *Watson* in *Learoyd* v. *Whiteley* (1): "Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard." In my judgment, directors are not under an obligation to avoid investments attended with hazard, but may, in the absence of anything to the contrary in the rules or articles of association, act in the same manner as business men of ordinary prudence. If any particular society or company should deem such powers too wide, it is competent for the members to frame rules or articles of association so as to impose such restrictions as they may deem advisable.

Is there, then, to be found in the rules any limitation on the powers of the directors as regards the nature of the property on the security of which they may make advances? It is observed that the rules of the society, though they deal with various special kinds of property, contain no reference to collieries. It is pointed out that one of the permanent officers of the society is the surveyor, whose duty it is to survey and value property offered as security, and whom the directors were bound to consult; and it is said that, inasmuch as the property offered by Mr. *Joseph* was of such a nature that Mr. *Innocent*, the duly appointed surveyor, was (as is admitted on both sides) not qualified to give an opinion as to its value, the directors ought at once to have seen that it was not one which they were authorized to accept. Rule 54 (as to the alteration of mortgaged property) was also referred to as shewing that the directors had no power to take the security of a wasting property, such as a colliery in active operation. Now the rules of the society appear to be

(1) 12 App. Cas. 733.

framed on the supposition that the property likely to be most frequently or ordinarily offered as security, or at all events one class of such property, would be land on which buildings were, or were proposed to be, erected, and there are to be found rules dealing with that kind of property. Mr. *Innocent* was an architect, and qualified to survey and value such property, and was doubtless chosen to fill the office of surveyor in the like expectation; but I do not find anything in the rules which limits the operations of the society to that or any other species of property. The terms of rule 47 are of the widest possible description: "The funds of the society shall be applied .... in making advances .... on legal or equitable mortgage of freehold, copyhold, or leasehold property;" and it was, therefore, within the powers of the directors to accept any such property as security. It might be difficult, or even impossible, to find a person duly qualified to advise them as to the value of every species of such property; and the rules do not appear to me either explicitly or by implication to prohibit them from obtaining the advice of a duly qualified expert in a particular case where the permanent surveyor might not happen to be such. As to rule 54, it appears to be directed to a different matter, and to have for its object to secure that changes in the nature of the mortgaged property shall receive the sanction of the directors. I am therefore of opinion that the proposed transaction was within the powers of directors.

I now proceed to consider whether the Defendants who appear have so acted with reference to a transaction which is within their powers as to be held liable for the advance of the £25,000.

Now, in the first place it must be observed that no question is raised as to the good faith of the defendants. The pleadings do not charge them with dishonesty or want of *bona fides*, and any such case was expressly repudiated by the liquidator in the witness-box. He said, in answer to a question put to him in cross-examination, "I do not suggest that they (the Defendants) acted otherwise than in good faith. I do not think they intended to do wrong. They may have been negligent, and relied too much on others." And I may add that nothing occurred in the course of the evidence which would lead me to suppose the opinion so expressed was otherwise than correct.

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Next, I think it right to point out that the Defendants who appear occupied a totally different position from Mr. *Allott*. He was in direct communication with *Joseph*, and took an active part in inquiring into the nature and value of the security offered by him. The other directors—I leave *Loxley* out of consideration—simply exercised their judgment on the materials submitted to them, and their defence is, in substance, that they acted on the reports of Sir *William Lewis*, and, in particular, that of the 30th of May, 1878; that those, in fact, were documents on which they were entitled to act, and which justified the action taken by them; that they have been guilty of no neglect or default, or, at any rate, of no neglect or default such as would deprive them of the protection conferred by rule 14.

Now, Sir *William Lewis* was the agent for the Marquis of *Bute* and other large colliery proprietors in *South Wales*, with the mining properties in which he states that he has been acquainted for a period of thirty-five years. Of his professional qualifications as an expert to advise the Plaintiffs there can be no doubt. Mr. *Brown* and Mr. *Higson*, expert witnesses called on behalf of the Plaintiffs, admitted that he was an experienced valuer of mining property, and competent to give a trustworthy opinion on its value. One of them (Mr. *Higson*) said he was quite equal to either Mr. *Brown* or himself. Various objections were, however, taken to him and the reports he made. It was said that he was a personal friend of Mr. *Joseph*, and an advocate of the loan, and that, under those circumstances, he was not a reliable adviser. Now his name appears to have been brought before the directors for the first time on the 15th of April. It occurs in Mr. *Joseph's* letter of the 5th of April, along with the names of four other gentlemen, none of whom are shewn to be incompetent, and two at least of whom are admitted by Messrs. *Brown* and *Higson* to have been experienced and competent valuers of mining property. At the Board meeting, it is stated by the Defendant *Braileford*, that Mr. *Allott* reported that he had selected Sir *William Lewis* as first on the list, and had been in communication with him, and on this report, and on the strength of Sir *William Lewis* being the Marquis of *Bute's* agent, the directors appear to have sanctioned the employment of Sir *William Lewis*

to advise them. I am unable to see that in this respect they have failed to exercise ordinary care.

As regards his advocacy of the loan, it certainly appears from a letter of his, dated the 25th of May, 1878, that he urged the loan on Mr. *Allott*. It is possible that very cautious persons might have considered that in this he was stepping beyond his province as an adviser of the society, and might have been led to distrust the advice he gave. But, however this may be, there is no evidence that this letter was brought before the other directors, or that any of them knew that he was in any way pressing the making of the advance; and I have been unable to come to the conclusion that any of the directors other than Mr. *Allott* were aware of any circumstances, as regards Sir *William Lewis*, which ought to have led them to look with suspicion on his reports or statements.

It is further said that Sir *William Lewis* received no instructions on behalf of the Plaintiff society; that he valued the property, not as on behalf of the intending mortgagees, but on behalf of the mortgagor; and great stress was laid on the letter of the 27th of April, 1878, by him to *Allott*, in which he said, "I do not know whether I am supposed to be acting for you or for Mr. *Joseph* in the matter." Now, it is true that no formal instructions appear to have been given to Sir *William Lewis*; but on the 15th of April there was before the board his letter dated the 11th of April, 1878, in which he proposed to meet Mr. *Allott* at the colliery. Mr. *Allott's* visit was sanctioned at that meeting. Mr. *Allott* was an accountant and a person of experience in colliery matters, and it seems to me that the directors were justified in entrusting to him the duty of communicating with Sir *William Lewis*, and it is not made out, in my opinion, that anything which it was essential and proper that he (Sir *William Lewis*) should know for the purposes of his valuation was withheld from him. His report of the 27th of April, 1878, was addressed to Mr. *Allott*, and begins thus: "In compliance with your request, I visited the *Dunraven Colliery* on Tuesday last with the view of advising you as to the conditions," &c. And this document was submitted to the board. If, in point of fact, Sir *William Lewis* did value on behalf of the

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mortgagor (which is not, in my opinion, made out); he, nevertheless, appears to me to have framed his report in such a way as naturally to lead the directors (again excepting *Allott*) to believe that he was acting for them and valuing on their behalf.

As to the letter of the 27th of April, 1878, that means, I think, no more than this, that Sir *William Lewis* did not know to whom he was to look for his fees; but, whether this be so or not, there is no evidence that that letter was ever laid before the directors, nor do I think that they could suppose that Sir *William Lewis* was acting otherwise than on their behalf. I think, therefore, that, as men of business, they might reasonably accept the reports of Sir *William Lewis* as documents obtained on their behalf, and with a view to their making the proposed advance.

Were, then, those reports such as on the face of them to justify what the directors did? Now, the loan was in the first place sanctioned at the meeting of the 1st of May, 1878. At that time no detailed valuation of the properties had been laid before the directors, and it was said that there would have been a want of care on the part of the directors if that advance had been made simply on the materials which up to that time had been brought to their notice. I do not think I am called upon to decide that question. In point of fact, the advance was not so made; and the matter was again brought before them and reconsidered on the 4th of June, and it is by what they did on that day that their liability must be determined.

Further, in dealing with the case, the value of the personal security of Mr. *Joseph*, and of the collateral security (such as it was) given by Mrs. *Joseph* and her children, must, as I have already pointed out, be laid out of consideration, and the question is whether the detailed report of the 30th of May, taken in conjunction with the previous reports of Sir *William Lewis* as to the value of the leasehold property, was such as to justify them in making the advance of £25,000. Now, that report of the 30th of May gives a separate valuation of the several items, shewing that the property on which the Plaintiffs were to have the first charge was of the value of £20,680, and that on which they were to have a second charge was of the value of £109,860, leaving a margin of upwards of £69,000, after deducting the first charge of

£40,000. It also contains statements from which it would be reasonably inferred—if indeed that was not apparent on the face of the matter—that the property was of a speculative description, and dependent for its value on the course of trade.

Such property would not, according to the decision in *Learoyd* v. *Whiteley* (1), have formed a proper subject for an advance by trustees of an ordinary will or settlement; but, for the reasons already given, I think that the rules which bind trustees do not apply to directors of building societies, and that the latter are not precluded from making advances on securities of a speculative nature.

Again, part of the security consisted of a second mortgage, on which the rules of the Court prohibit ordinary trustees from making advances. That prohibition rests, I apprehend, on the ground that such security is of the class which is attended with hazard. The risk is twofold. First, there is the danger attendant on the absence of the legal estate, which would usually, at all events, be in the first mortgagees. As to this, it may be pointed out that rule 47 expressly authorizes advances on equitable mortgages, so that the directors were not limited to securities under which a legal estate would become vested in the Plaintiff society. Secondly, there is the danger arising from the probable want of means on the part of the mortgagor to pay off the first mortgagee, in the event of his attempting to enforce his right by foreclosure, to the disadvantage of the second mortgagee. This risk is one which, as it seems to me, a business man of ordinary prudence might be willing to incur.

Under these circumstances, I am unable to come to the conclusion that the directors shewed a want of ordinary care, or were guilty of negligence, in acting on the reports of Sir *William Lewis*. It is, however, to be observed that in the property on which the Plaintiff society was to have a first charge is included *Blaenselsig*, to which Mr. *Joseph*, the mortgagor, had no title, legal or equitable. Of this Sir *William Lewis* was well aware, and I have already mentioned the explanation he gave in the witness-box. Sir *William Lewis* further said in his evidence that the fact was known to Mr. *Allott*. As against him I am not at liberty to avail myself

(1) 12 App. Cas. 727.

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of this evidence; but the statement of claim contains in paragraph 20 an allegation that *Joseph* had not entered into any binding agreement for a lease of the *Blaenselsig* minerals, "as the directors well knew"—an allegation which must be taken to be true as against Mr. *Allott*. It was the duty of Mr. *Allott*, if he knew this, to call the attention of his co-directors to it. But so far from that, we find him speaking in his letter of the 4th of June, 1878, of the "*Bute* lease," as if a lease of *Blaenselsig* had been actually granted; and Mr. *Kidner*, the secretary of the society, in referring the matter to the solicitor, says, in a letter of the 5th of June, 1878: "There is to be a first charge on *Tydraw House* and surface with tipping rights, also upon the Earl of *Jersey* mineral leases, and a lease just obtained from the Marquis of *Bute* and Mr. *Homfray*." That it became known to the solicitor in the course of the preparation of the securities that such a lease did not exist is obvious from the form of the security ultimately taken. Yet, notwithstanding the provision of rule 26, directing him, "where such title is not deemed by him good and sufficient," to render a report in writing thereof to the directors, he made no report of any kind on the subject; not did he avail himself of the right of attending meetings of the directors (conferred by the same rule) to bring the matter before the board. The solicitor, though still living, was not called as a witness, and I know not what explanation he may have to offer of that which, *primâ facie*, would seem to be an omission on his part. In the result, the absence of title to *Blaenselsig* was not brought to the knowledge of the directors other than *Allott*.

Neither, again, do I know how it happened that the same solicitor did not report to the board that the requisition as to the production of receipts was not complied with, because it appears by the evidence that at the time when the mortgage was completed the rents and royalties were in arrear. This fact, however, was not known to the directors whose case I am now considering, and on the whole I come to the conclusion that they have not as regards the original advance been guilty of any neglect or default such as would deprive them of the benefit of rule 14.

The advance of £41,000 in November, 1881, is next to be considered. It is of a totally different nature from that of the

£25,000. It does not fall within the category of ordinary advances to members, for it was made on terms other than any of those prescribed by rule 60. It was not an investment of any portion of the funds of the society, for there were no funds to invest, and the money actually used was borrowed. There is no rule which, in express terms, sanctions such an advance, but it was sought to be justified in argument on the ground that the directors, having power to make advances on second mortgage, had by implication power to redeem a prior charge, and that this was the best, and indeed the only, course open to them under the circumstances.

To this it was answered, on behalf of the Plaintiffs, that the directors had no such implied power, and in support of this proposition the case of *Small* v. *Smith* (1) was relied upon. That case came before the House of Lords on appeal from the Court of Session in *Scotland*. It appeared that a building society in *Scotland*, incorporated under the Act of 1874, had made an advance to a Mr. *McDonald*, a member of the society, on the security of certain property subject to a prior charge in favour of *Small* and others, the appellants to the House of Lords, for £3000. This security contained a proviso enabling the society to pay off this prior charge, and binding *McDonald*, the mortgagor, to repay to the society the expenses of discharging the prior security. The prior incumbrancers, the appellants, gave, as by the law of *Scotland* they were entitled to do, notice that they proposed to exercise the power of sale incidental to their security; and thereupon negotiations took place between them and the directors of the building society, which resulted in the grant by the directors of a bond whereby the society, in consideration of the appellants forbearing for six months to exercise the power of sale, became bound at the expiration of that period to pay to the appellants what was due on their prior incumbrance. The consideration for this bond did not appear on the face of it, but was, in fact, the appellants' forbearance to exercise the power of sale. The question was whether that bond was binding on the society. The rules expressly empowered the directors, on the failure of an advanced member to pay what was due from him, to enter into

(1) 10 App. Cas. 119.

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possession and receive the rents and profits, and to sell; and it was provided that when such default was made "the society should have full power to act in every respect as absolute proprietor and owner of the property." There was also a rule (96) that the directors should have power "to act for the society in accordance with the rules in any matter which might arise." It was held that neither under the special powers which were conferred on the directors by the rules of the society, nor under the general powers vested in them by implication, could the giving of the bond in question be justified, and it was held not to be valid.

The case, therefore, is a different one from that which I have to consider, and it is important to notice the grounds upon which this conclusion was based. Lord *Selborne*, who first advised the House, says this (1): "I entirely adhere to what was said in this House in the case of *Attorney-General* v. *Great Eastern Railway Company* (2), that when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, *primâ facie*, to follow from the authority for effectuating the main purpose by proper and general means. I think it is quite right to invite your Lordships to apply that principle to the present case. In order to see how it applies, we must ascertain first of all what the main purpose here is, then what are the general powers of the directors, then what are their special powers, and then, supposing that this is not within the natural meaning either of their general powers or of their special powers, whether it can be brought in as incidental to the main purpose and a thing reasonably to be done for effectuating it." Then his Lordship discussed first of all the purposes of the society, and then the general powers of the directors, and then their special powers, and he found nothing in them which would justify the transaction which was the subject-matter of the litigation in that case. Then he goes on (3) to say this: "The argument really is that because the rules permit

(1) 10 App. Cas. 129. (2) 5 App. Cas. 473.
(3) 10 App. Cas. 133.

this kind of security to be taken, that is to say, give very large and general powers as to securities, which do not exclude the taking of a security in which there is a prior mortgage, therefore there is a potential necessity for entering into a transaction of this kind to protect that security, and therefore there is a reasonable implication that there is power to do it. But I wholly deny that there is any potential necessity at all. If this were a proper consequence of the relation constituted between mortgagor and mortgagee or of the relation constituted between a first mortgagee and a second mortgagee, if it were one of those things which by working out the legal rights or remedies already existing on the one side or the other would or might result, the argument would be perfectly sound; but there is no more potential necessity for doing this in order to meet a temporary inconvenience than there is for doing anything else in the world which in the opinion of the directors might tend to obviate that inconvenience. For example, supposing that they had no credit by which they could borrow money, and that they were entitled to borrow money to redeem this prior mortgage, could they or could they not make reckless sales unauthorized by the trust deed of any part of the assets or property of the society? That would be a very improper thing to do, at all events, and no one can possibly say that any such thing is to be implied. The grounds of such an implication must be found in the nature of the situation and the reasonable consequences of that situation, and not in what a man who may do what he pleases with his own may or may not consider proper to do under such circumstances. To say that because a man is a second mortgagee for £1000 it is a natural consequence of that situation, or a potential necessity, that when a notice of sale is given by the prior mortgagee he shall make himself liable to him for £2500 which was not his own debt before; to represent that as growing out of, or consequential upon, the situation in which the company was placed by what had been done under the rules, is going beyond all bounds of reason." Then he refers by way of illustration to a case in which express provision was made in the rules then in question. By the 42nd of those rules the society was enabled, in case any member after receiving an advance should leave build-

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ings on land which he had mortgaged unfinished, to enter upon and take actual possession of such buildings and premises, and to sell the same either by public auction or private contract, or to employ persons to provide the requisite materials and labour, and to furnish and complete the same at the cost of such member, and to advance the sums requisite for this purpose out of the funds of the society. Then he says (1): "Let me suppose that there had been no such rule; could it seriously have been argued that because the company took a security upon land, the value of which they expected to be improved by building, the directors could lay out the whole, or any amount they pleased, of the funds of the society in an expensive building speculation—in building upon the property those houses which the debtor had been expected to build? It was thought desirable that that power should be expressly given; but could any reasonable man have implied it if it had not been given? I am speaking, of course, not of a case of some little work to be done after taking possession in order to complete a building already partially erected upon the land. I am supposing a total failure to build at all, and that the land which constituted the security had no buildings erected upon it, and was not in the state of land covered with houses, though it ought to have been so if the member had fulfilled his contract."

Then Lord *Blackburn* says (2): "As at present advised I do not think that the directors had any power at all to do it. It is not a case of persons acting for themselves, and being *sui juris*, who may make any bargain, wise or foolish, which they please, but it is the case of persons acting by an authority. We must see what the authority is. The authority which is given to the directors is, to manage all the affairs of the society according to the nature of its business, according to these rules. I think that according to that they might do very much the same things which by common law a partner in a business limited in the same way would be entitled to do. It is not one of the powers which a partner has to give a guarantee: he may do it of course so as to bind himself, but he cannot do it so as to bind the firm."

(1) 10 App. Cas. 134. (2) 10 App. Cas. 137.

Then Lord *Watson* says (1): "It appears to me that the true test to apply in such a case is not to consider whether the act might have been competently performed by an individual, or by directors who were not fettered by regulations, or articles, or a memorandum of association. The real test is to consider whether the act is authorized by the statutory rules of the society, which perform a twofold function; in the first place they define the power of the directors, and in the second place they ensure that all who deal with the directors shall have notice of the precise limits of their authority. We cannot assume that the directors have power to do everything which may be usually done by unfettered directors, or by individuals. We must consider whether the rules confer, either expressly or by any fair implication, authority upon the directors to grant a bond of corroboration binding upon the society." I pass for a moment the next paragraph, with which I shall have to deal more particularly presently. Then he goes on (2): "It is said, however, that they have that power by implication in the special case of realization, whenever it becomes expedient and desirable on the part of the society that they should purchase time from the prior bondholder. Now, I quite admit that circumstances might render that a very proper and very expedient step in the case of an individual *sui juris*, or in the case of directors who have unlimited powers to conduct business according to the rules which guide individuals; but that is not the question here. Is it in any fair sense of the word incidental in the sense of being necessarily incidental, to the realization of the security?"

It thus appears to have been laid down by Lord *Selborne* that the directors of a building society have power by implication to do those things which are "proper consequences of the relation constituted between mortgagor and mortgagee, or the relation constituted between a first mortgagee and a second mortgagee," or which, "by working out the legal rights or remedies already existing on the one side or the other, would or might result." But he holds that it was not a natural consequence, or a potential necessity of the position of a second mortgagee, that that second mortgagee should make himself personally

(1) 10 App. Cas. 138. (2) 10 App. Cas. 139.

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liable for the prior mortgage debt. And all the noble Lords agree that the question in a case like this is one of the authority of the directors, to be ascertained from the rules of the society; and they distinguish the position of the directors from that of a person who is *sui juris*, or of directors who, in the words of Lord *Watson*, are "unfettered," or "have unlimited powers to conduct business according to the rules which guide individuals." Those last expressions appear to have reference to a case which was cited and relied on in the argument before the House of Lords and also before me, namely, *Royal Bank of India's Case* (1). To that I shall refer very shortly. The articles of association in that case contained a provision (article 71) that "The board of directors shall have full power, and it shall be their exclusive province, to prescribe the mode of receiving, collecting, and expending the moneys and funds of or owing to the company, and of drawing cheques, and otherwise disposing of the funds and moneys which from time to time shall be in the hands of the bankers or treasurer, or otherwise at the disposal of the company; and the board of directors shall have full power in all respects as they shall think advisable, to direct, control, and provide for the receipt, custody, and issue, management, remittance, and expenditure of the moneys and funds of the company." Lord Justice *Selwyn* says (2): "The 71st of the articles of association gives to the directors powers of very extensive and general character—in fact, to do everything which in their judgment should be necessary for the purpose of carrying on this business of banking."

The rules of the Plaintiff society contain no such clause as the *Royal Bank of India's Case*. On the other hand, they deal less minutely with the powers and duties of directors than those which were the subject of discussion in *Small* v. *Smith* (3); and there is none which specifically authorizes the directors to redeem a prior incumbrance on property over which they have taken a security.

The question whether or not such a power is to be implied depends (as did the question which fell to be decided in *Small* v.

(1) Law Rep. 4 Ch. 252. (2) Law Rep. 4 Ch. 256.
(3) 10 App. Cas. 119.

Smith (1)) on whether there is, in the language of Lord *Selborne*, "a potential necessity for entering into a transaction of the kind to protect the security;" and that question, according to his Lordship, is to be answered in the affirmative if the transaction be a proper consequence of the relation constituted between a first mortgagee and a second mortgagee. It appears to me that the redemption of a first incumbrancer threatening to foreclose is such a consequence, for it is the only means of preventing the subject-matter of the second incumbrance being entirely swept away.

But I have to consider a paragraph which I have passed by in the speech of Lord *Watson*. He says this (2): "The directors in the present case had by the rules power to hold bonds, whether first or postponed bonds, and dispositions in security; and they had undoubtedly not only the power, but the duty laid upon them of realizing those bonds and dispositions in security. It is said to be within the power of the directors, under these rules, to acquire prior bonds for the purpose of protecting the interests of the society as postponed bondholders. I am quite prepared to concede that proposition, but upon this condition only, that the funds of the society are at the time in the state described in rule 84. In that case the act of acquiring these preferable bonds might be justified under rule 84, because it might be an investment, sanctioned by that rule, of funds which at the time were idle; that is to say, not required for the purpose of being advanced to members of the society. But I demur to the proposition that they would be entitled to swell those funds which are not required for the main purposes of the society by exercising their borrowing powers in terms of rule 86." I do not think that what is there said is intended as an expression of opinion to the contrary of what is laid down by Lord *Selborne*, for his Lordship is there dealing with the case of a Scotch heritable bond, the holder of which has no right of foreclosure such as by the law of *England* is vested in a first mortgagee.

In my judgment, therefore, the directors had power to pay off the first incumbrance. If it was within their power to redeem, it was also within their power to borrow the necessary funds for the purpose, and the discretion which they exercised has not

(1) 10 App. Cas. 119. (2) 10 App. Cas. 138.

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really been impeached. I think, therefore, that this portion of the case fails as against the Defendants other than *Allott* and the representative of *Loxley*.

I have next to consider the case so far as it relates to the sums expended by the directors out of the assets of the company for what is termed in the statement of claim "the preservation, maintenance, and working of the colliery." It was contended (again on the authority of *Small* v. *Smith* (1)) that this expenditure was altogether beyond the powers of the directors. On the other hand, it was contended, on the authority of the *Royal Bank of India's Case* (2), that the whole of this expenditure took place as a consequence of acts proper and prudent to be done with a view to obtaining the benefit of the security. The test, according to *Small* v. *Smith*, is not whether the acts might properly be done by individuals or unfettered directors, but whether the rules expressly or by fair implication confer on the directors power to do them. Now, there is no rule which expressly sanctions such expenditure. Neither is there any rule conferring on the directors of the society any such unlimited authority as was vested in the directors in the *Royal Bank of India's Case*. The rules, again, do not (as was the case in *Small* v. *Smith*) prescribe the duties of the directors as to the enforcing and realizing of securities, but, by rule 19, they are empowered to do such acts as are authorized by the *Building Societies Act* of 1874. Sect. 13 of that Act confers on building societies power to hold land with the right of foreclosure (subject to the obligation to convert into money as soon as may be conveniently practicable), to which an absolute title has been acquired. Under the powers so conferred the Plaintiff society might enter into possession of any land, whether freehold, copyhold, or leasehold, comprised in a mortgage made by a member to secure an advance, and might retain possession till a sale was conveniently practicable. By the rules the directors are, as it appears to me, authorized to do the same thing. Apart from this, I conceive that, under the general powers of management vested in the directors, they have by implication power to make use of any of the ordinary remedies of mortgagees, amongst which is to be reckoned the power of entering into possession of

(1) 10 App. Cas. 119. (2) Law Rep. 4 Ch. 252.

the land comprised in these securities. Such entry is, in the language of Lord *Selborne*, one of those things which would or might result from the working out of the legal rights and remedies already existing. I hold, therefore, that the directors had power to enter into possession.

This being so, it appears to me to follow that, if the land be leasehold, the directors, having entered into possession, must have power to make all ordinary payments necessary to prevent the forfeiture of that property, and in particular to expend out of the assets of the society all sums necessary for the payment of rent, when such payment is secured by a power of re-entry contained in the lease. I do not think that any inference to the contrary can fairly be drawn from the special provisions contained in the rules of the society; on the contrary, rule 53 authorizes the payment out of the funds of the society of any chief or ground rent not duly paid, and would, as I think, apply even although the society had not entered into possession of the property which is subject to the rent.

It follows from what I have said that the directors had power to enter into possession of the leasehold property mortgaged to them, and to pay the rents reserved by the leases under which Mr. *Joseph* held, so as to prevent the forfeiture of the demised property under the power of re-entry, and to expend out of the assets of the society all sums necessary for that purpose; and consequently that they cannot be liable for such expenditure.

On the other hand, there is at least one considerable item for which it appears to be difficult to find legal justification. At the time when they entered into possession the wages of the miners were in arrear, and the directors paid those arrears, and expended in so doing sums amounting to £2692 19*s.* 10*d.* This expenditure does not appear to me, as at present advised, to be, in the language of Lord *Selborne*, "a proper consequence of the relation constituted between mortgagor and mortgagee," or one of the things "which, by working out the legal rights or remedies already existing on the one side or the other, would or might result;" but to be rather a thing done "to meet a temporary inconvenience," and one which there was no potential necessity to do. That is my present opinion upon the evidence before me; but I

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do not think these items were gone into very carefully, or discussed from the point of view from which I look at them, and therefore I mean to leave it open to the Defendants to adduce further evidence as to the circumstances under which the wages were paid. As regards the other items, it is not so easy to lay down any precise rule defining which are proper and which are improper. The difficulty may be illustrated by a passage in Lord *Selborne's* speech, which I have already read, where he appears to lay down that directors might complete a building partially erected upon land, although they could not proceed to build where there had been a total failure to perform a contract to erect houses on the land.

Under these circumstances, I think it would be best that, before the case is finally disposed of, there should be an inquiry as to what assets of the company have been expended by the directors otherwise than in making the advances or in payment of the rents reserved by the leases under which the various portions of the mortgaged property were held.

Lastly, I have to consider how the case stands as against the Defendants *Allott* and the representatives of *Henry Loxley*. [His Lordship read the 7th, 18th, 19th, 20th, and 40th paragraphs of the statement of claim set out above, and continued:—] Upon these allegations, which must be taken to be admitted, I should come to the conclusion that the directors, Mr. *Allott* and Mr. *Loxley*, advanced the £25,000 upon an improper security, and without making those inquiries which persons of ordinary care in their position would have made; and, consequently, that Mr. *Allott* and the estate of *Loxley* are liable in respect of that advance. The subsequent advance of £41,000, and the expenditure for the preservation, maintenance, and working of the colliery, were made for the purpose of protecting a security which ought never to have been taken, and are therefore as improper as the original advance. I think, therefore, that Mr. *Allott* and the estate of *Henry Loxley* are liable for all the sums mentioned in the statement of claim.

The precise terms of the judgment will require some care, and I shall be glad of the assistance of counsel in framing it. Subject to any remarks which may be made, the following occurs to

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me as an outline of what should be ordered:—Declare that the Defendant *Allott* and the estate of *Henry Loxley* deceased are jointly and severally liable to make good to the Plaintiffs the amounts advanced out of the assets of the Plaintiffs to *Joseph*, in the statement of claim mentioned, and also the amounts expended out of the assets of the Plaintiffs for the preservation or the maintenance and working of the colliery and securities therein also mentioned, with consequential accounts and inquiries, and order them to pay the costs up to the trial; such costs being those appropriate to a judgment obtained upon the statement of claim. Dismiss the action, with costs, against the representatives of Mr. *Leader*. Declare that the remaining Defendants are not liable to make good to the Plaintiffs the amounts advanced out of the assets of the Plaintiffs to *Joseph*, or expended out of such assets in payment of the rent reserved by the leases under which the leasehold estates comprised in the several securities in the pleadings mentioned were, or are, held. Dismiss the action, with costs, against the Defendants other than *Allott* and the legal personal representatives of *Loxley*, so far as it claims relief in respect of the amounts so advanced and expended as aforesaid. Direct an inquiry whether any and what amounts have been expended out of the assets of the Plaintiffs for the purposes of the said colliery otherwise than in accordance with the last-preceding declaration, and, if so, for what purposes and under what circumstances, and by which of the directors respectively; and reserve further consideration, and all costs not disposed of by the judgment.

Solicitors: *Geare, Son, & Pease*, agents for *B. Wake & Co., Sheffield; Pilgrim & Phillips*, agents for *Watson, Esam, & Barber, Sheffield; Arnold Williams & Co.*, agents for *Parker & Brailsford, Sheffield; Torr, Janeways & Co.*, agents for *Burdekin, Benson, & Burdekin, Sheffield; Pattison, Wigg, & King*, agents for *Broomhead, Wightman, & Moore, Sheffield.*

W. W. K.

STIRLING, J.

1889
Nov. 7.

1890
Jan. 11, 23.

In re GREAT NORTHERN SALT AND CHEMICAL WORKS.
Ex parte KENNEDY.

Company—Allotment of Shares—First Directors—Appointment, Validity of—Contributory—Evidence—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 154, *Table A, Arts.* 52, 53, 58, 61, 62, *and* 66 [*Revised Ed. Statutes, vol. xiv., pp.* 236, 256, 257.]

The seven subscribers to the memorandum of association of a company, regulated by Table A, without meeting together for the purpose, all signed a document in writing, dated the 27th of July, 1888, appointing four persons to be the first directors of the company, and these four persons met and resolved that two directors should form a quorum to transact the business of the company.

At the first ordinary meeting, which was held on the 20th of August, 1888, these four persons did not retire from office as provided by art. 58 of Table A; but a resolution was passed at the meeting authorizing them to continue to act as directors; and two of those four persons on the same day allotted to *C. K.*, an applicant, 200 ordinary shares in the company:—

Held, first, that as the subscribers to the memorandum of association had all concurred in appointing the first directors of the company, the fact that they had not met together for the purpose of coming to their determination did not invalidate their act, and, accordingly, that the appointment in writing of the 27th of July, 1888, was good:

Held, secondly, that the resolution passed at the general meeting of the 20th of August, 1888, was valid to the extent of continuing in office the then present directors:

Held, thirdly, that Art. 62 of Table A, which provides that, if at any meeting at which the election of directors ought to take place the places of the vacating members are not filled up, the meeting shall stand adjourned till the same day in the next week, and further provides as therein mentioned, is directory only; and that the meaning of that article is, that if for any reason either the first meeting, or the adjourned meeting at which the election of directors ought to take place, does not proceed validly to fill up the places of the vacating directors, then they are to continue in office:

And, *held*, accordingly, that the four directors were validly in office on the 20th of August, 1888, and that the allotment of 200 shares made to *C. K.* by two of these four directors was valid.

C. K. afterwards, as he admitted, applied for 300 preference shares, and received an allotment of them. By the company's allotment book it appeared that 300 shares were allotted to him on the 29th of September, 1888, but no minutes were kept after the 20th of August, 1888. The company was afterwards ordered to be wound up, and at that time *C. K.*

was on the register of shareholders as the holder of 500 shares. *C. K.* disputed the validity of both allotments to him:

Held, that as *C. K.* was a contributory in respect of his 200 shares, the allotment book of the company was, under sect. 154 of the *Companies Act*, 1862, *primâ facie* evidence against him of an allotment to him on the 29th of September, 1888, and that, although there was no record of any board or committee meeting on that day, the entry in the allotment book, coupled with his admission, threw upon him the burden of proving that the allotment was invalid; and that, not having discharged it, he must be settled upon the list as a contributory for the 300 shares as well as the 200 shares.

D'Arcy v. *Tamar, Kit Hill, and Callington Railway Company* (1) distinguished.

Dictum of *Wood*, V.C., in *Hallows* v. *Fernie* (2) adopted and followed.

THIS was an application by the official liquidator in the winding-up of this company to settle Mr. *Colin Kennedy* on the list of contributories as the holder of 500 £1 preference shares, which were standing in his name in the books of the company, and which were alleged to have been allotted to him, as to 200 shares, on the 20th of August, 1888, and as to 300 on the 29th of September following. It was admitted by Mr. *Kennedy* that he applied for these shares, and that in each case he received notice of allotment, and was treated as a shareholder by the company; but he disputed the validity of both allotments, on the ground that the persons by whom the allotments were purported to be made were not duly appointed directors of the company.

The company was formed for the purpose of purchasing from Mr. *T. Fenwick* a salt mine near *Middlesboro*, in *Yorkshire*, and it was registered in May, 1888, as a company, with limited liability, having a capital of £150,000, of which £50,000 were in 8 per cent. preference shares of £1 each. The memorandum of association was signed by seven persons, viz., Messrs. *J. W. Jillings*, *W. Molineux*, *G. Ruddock*, *H. Parry*, *W. Jenkinson*, *T. Fenwick*, and *A. Odell*. No articles of association were filed, and consequently the affairs of the company were governed by Table A of the *Companies Act*, 1862.

On the 12th of May, 1888, a meeting was held purporting to be a meeting of the subscribers to the memorandum of association. At this meeting only two of the subscribers were present, but

(1) Law Rep. 2 Ex. 158. (2) Law Rep. 3 Eq. 520, 537.

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these two purported to appoint certain persons directors, and in the record of this meeting it was stated that Mr. *Thomas Fenwick* would join the board after allotment.

On the 12th of July, 1888, a meeting purporting to be a meeting of directors was held; the persons acting as directors expressed their intention of resigning, and passed a resolution suspending all further operations of the company, and concluding thus: "The intended resignation of the present board has been deferred until the solicitor should report at the next meeting."

No formal resignation, however, was, according to the evidence, ever made; but a second meeting of the subscribers to the memorandum of association was held on the 16th of July, 1888. This meeting was attended by three only of the subscribers, and they purported to appoint four persons, viz.: Mr. *Jillings*, Mr. *Parry*, Mr. *Jenkinson*, and Mr. *Smith*, to be directors.

It was admitted that the appointments of directors purported to have been made on the 12th of May and the 16th of July were in both instances invalid, as neither of those meetings was attended by a majority of the subscribers.

On the 19th of July, 1888, Mr. *Greenip*, a solicitor, was consulted with regard to the affairs of the company by Mr. *Fenwick*, who, as above mentioned, was one of the subscribers of the memorandum of association and a vendor to the company; and the result was that Mr. *Greenip* prepared and sent to be engrossed a document which bore date the 27th of July, 1888, and was as follows: "The *Great Northern Salt and Chemical Company, Limited*, 9, *Mincing Lane, London, E.C.*, 27th July, 1888. We, the undersigned, being subscribers to the memorandum of association of the above company, do hereby nominate and appoint *D. Smith*, Esq., manufacturer, 39, *Emperor's Gate*; *Henry Parry*, Esq., *East India* merchant, *Leadenhall Street*; *J. W. Jillings*, Esq., 36, *St. James's Place, Pall Mall*; and *T. Fenwick*, Esq., director of the *Extended Electro Metal Company, Limited*, 9, *Mincing Lane*, to be the first directors of the said company." According to Mr. *Greenip's* evidence, which was corroborated by that of his clerk, he handed the engrossment to Mr. *Fenwick*, on the 27th of July, 1888, and Mr. *Fenwick* returned it to him on the morning of July 30th, signed by all the seven subscribers to the memorandum

of association and in the state in which it was produced in Court. The genuineness of these signatures was disputed; but upon the evidence it was held by the Court that the document was actually signed, as it purported to be, by all the seven subscribers to the memorandum of association.

On the same day, the 30th of July, a board meeting was held. The persons present thereat were thus specified in the minutes: "Present—directors, Messrs. *D. Smith*, *Henry Parry*, and *J. W. Jillings*; in attendance—Mr. *Fenwick*, the vendor, and Mr. *Greenip*, the company's solicitor;" and the first entry in the minutes was as follows: "It was stated that the directors had been duly appointed by the subscribers to the memorandum of association." On the 2nd of August, 1888, another board meeting was held, and the following resolution was passed: "That until otherwise arranged the business of the company may be conducted by a quorum of two directors at any board meeting." In the minutes of this meeting Mr. *Fenwick* was again stated to have attended as the vendor.

On the 20th of August, 1888, two meetings were held, one of which was a meeting of the members of the company, and was the first statutory general meeting, and the other was a meeting of the directors. The minutes of the general meeting contained the following entry:—"It was reported that notice had been duly sent to each shareholder. It was resolved that the appointment of other or any further directors be in the option of the directors appointed by the subscribers to the memorandum of association, which directors are hereby authorized and requested to continue to act for the present, namely, *D. Smith*, *H. Parry*, and *J. W. Jillings*." At the meeting of the directors, which was held on the same day and was called for the same hour as the general meeting, Mr. *D. Smith* was in the chair; Mr. *Parry* was present as a director, and in attendance was Mr. *Fenwick*, with Mr. *Jenkinson*, as secretary *pro tem.* According to the minutes of that meeting, it was then proposed by the chairman, seconded by Mr. *Parry*, and carried: "That the 2046 shares, as per detached list below, be and are hereby allotted to the various applicants." Among the applicants in that list there appeared the name of Mr. *Colin Kennedy* as an applicant for 200 shares, and that number

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of shares was accordingly then allotted to him. At the same meeting it was proposed by the chairman, and seconded by Mr. *Parry* and carried, "That Mr. *Thomas Fenwick* be and is hereby elected managing director of the company in accordance with the agreement;" and it was resolved, "That Mr. *D. Smith*, chairman, and Mr. *Fenwick* be and are hereby authorized to allot all shares as applied for."

After the 20th of August no further minutes were kept, and with respect to the 300 shares alleged to have been allotted to Mr. *Colin Kennedy* on the 29th of September, there was no evidence of the circumstances under which such allotment was made; but in the allotment book of the company the name of Mr. *Kennedy* was entered as the allottee of 300 preference shares on the 29th of September, 1888. The company was ordered to be wound up upon the petition of a contributory on the 24th of November, 1888. At that time Mr. *Colin Kennedy* was on the register of shareholders as the holder of 500 shares; but though he admitted that he had applied for the 300 shares as well as the 200, and that he had received a letter of allotment in each instance, he objected to be put upon the list of contributories, upon the ground that neither allotment was valid.

The existence of the document of the 27th of July, 1888, was not discovered by the solicitors to the liquidator until after the matter had been adjourned into Court.

Hastings, Q.C., and *Bramwell Davis*, for the official liquidator:—

The main question is whether the directors who allotted these shares to Mr. *Kennedy* were properly appointed; and we contend that they were. Upon the evidence, the document of the 27th of July, 1888, was signed by all the seven subscribers of the memorandum of association. All that is said by art. 52 is, that the names of the first directors "shall be determined by" the subscribers of the memorandum; and so long as all the subscribers do actually concur in determining the names of the first directors, as they have done by this document, there is no necessity for them to meet together for the purpose or to express their determination in any particular way. The *dictum* of

Wood, V.C., in *Hallows* v. *Fernie* (1) is directly in point; and *Collie's Claim* (2) shews that an act within the powers of directors in which they have all concurred with full knowledge of all they were doing is valid, although they may not have assembled together for the purpose of doing it.

The four directors were accordingly validly appointed; they resolved that two directors should be a quorum, and the allotments are therefore good.

Oswald, for Mr. *Kennedy* :—

There is no proof of a valid allotment either as to the 200 or the 300 shares sufficient to entitle the company to put Mr. *Kennedy* on the list of contributories. There never can have been any valid allotment, because there never have been any properly appointed directors. The only meetings of the subscribers to the memorandum which ever were held for the purpose of appointing directors were those of the 12th of May and the 16th of July, 1888; at the first only two, and at the second only three, of such subscribers attended, and no appointment of directors made by a minority of the subscribers has any validity: *Howbeach Coal Company* v. *Teague* (3); *In re London and Southern Counties Freehold Land Company* (4). In the latter case, Mr. Justice *Chitty* said that he did not think that the present Master of the Rolls intended, in the case of *York Tramways Company* v. *Willows* (5), to throw any doubt upon the decision of *Howbeach Coal Company* v. *Teague*. Up to the 27th of July, 1888, therefore, there were no directors, although certain of the subscribers must be taken to have exhausted their powers by attempts to appoint them. At all events, if the subscribers still had power to make the appointment, they could not do so by paper. They have, under art. 52, to "determine" who are to be the first directors, and they must meet together for the purpose of this business in the same way that directors are required by art. 66 to meet together for the despatch of their business: *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (6). There is really no

(1) Law Rep. 3 Eq. 520, 537.
(2) Ibid. 12 Eq. 246, 258.
(3) 5 H. & N. 151.
(4) 31 Ch. D. 223.
(5) 8 Q. B. D. 685.
(6) Law Rep. 2 Ex. 158.

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authority in favour of the other side. In *Collie's Claim* (1) the question arose between the company and an outsider, and what was held was that, though the agreement was informal according to the internal regulations of the company, it was binding against the company in favour of a person dealing with them. *Hallows* v. *Fernie* (2) was an action for misrepresentation in which this point did not arise for decision, and the observation cited is a mere *obiter dictum.*

Again, by art. 58 of Table A, the whole of the directors are to retire from office at the first ordinary meeting; and by art. 62, if at any meeting where an election of directors ought to take place, the places of "the vacating directors are not filled up," the meeting is to be adjourned; and if at the adjourned meeting their places are not filled up, they are to continue in office until the ordinary meeting in the next year, and so on from time to time until their places are filled up. All these provisions have been disregarded. The directors appointed by the document must be taken to have retired at the general meeting of the 20th of August, and the allotment by them on the same day was invalid, even if their appointment was itself a valid one. Then as to the document, there is no evidence that it was signed by the persons whose names appear at the foot of it; whilst as to the 300 shares, there is no evidence of any resolution to allot them, or of any board meeting for the purpose.

It is true that Mr. *Kennedy* has admitted that he made applications for these allotments; but an admission by a layman upon what is practically a point of law does not bind him, and he was wrong as to the legal effect of what he did.

This is not a case in which anything in the way of appointment of directors or allotment of shares can in the absence of evidence be presumed to have been properly done, or in which the Court will attempt to extract something to bind an alleged contributory; for from first to last there has been nothing but confusion and irregularity in the management of the company's affairs: *Ex parte Smith* (3).

(1) Law Rep. 12 Eq. 246. (2) Law Rep. 3 Eq. 520.
(3) 39 Ch. D. 546.

STIRLING, J.:—

The transactions of this company have been so irregular that I think I ought not to act upon this document without further evidence: one or more of the signatures might have been affixed after the 20th of August.

Hastings, Q.C.:—The liquidator is ready to furnish further evidence.

Oswald:—I object, on behalf of Mr. *Kennedy*, to the introduction of further evidence to patch up the case against him at this stage of the proceedings.

STIRLING, J.:—

The list of contributories is being settled. The document is not free from suspicion, but I think I might be doing injustice if I did not permit the liquidator to bring forward further evidence. Mr. *Kennedy* will also have the opportunity of adducing further evidence, and if necessary of cross-examining. I shall accordingly direct the case to stand over in order that the further evidence may be brought forward.

1890. Jan. 11. The case was now again brought on, and further evidence was given as to the preparation and signature of the document of the 27th of July, 1888; after which

Oswald concluded his argument.

Hastings, in reply.

1890. Jan. 23. STIRLING, J. (after stating the facts of the case down to the second meeting of the subscribers to the memorandum of association on the 16th of July, 1888, continued):—

I must here state that at neither meeting did a majority of the subscribers attend; and consequently, according to the decision of Mr. Justice *Chitty*, in the case of *In re London and Southern Counties Freehold Land Company* (1), the appointment which purported to be made of directors on both occasions was invalid.

(1) 31 Ch. D. 223.

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[His Lordship then continued his statement of the facts and dealt with the evidence as to the preparation and signature of the document of the 27th of July, 1888, and while so doing observed that, although it appeared from the minutes of the meeting that Mr. *Fenwick*, who had been named as a director in the document of the 27th of July, 1888, did not attend the meeting of the 2nd of August as a director, but only as vendor, his Lordship thought he ought not on that ground to come to the conclusion that Mr. *Fenwick* was not appointed by that document a director, and considered that these attendances of his were open to the explanation that, although elected as a director, Mr. *Fenwick* did not desire to accept office or to act until allotment had taken place. His Lordship then continued:—]

I come to the conclusion, that in point of fact the document of the 27th of July, 1888, purporting to appoint the four gentlemen named therein to be directors, was a genuine document.

But then there is a question raised as to the validity in law of that document as a nomination of first directors, and it is said that it is invalid on the ground that for the purposes of making a valid election the subscribers to the memorandum of association ought to meet. [His Lordship then read the material articles of Table A, and resumed:—] Now, granting that the directors in order to transact business must meet, and that the subscribers to the memorandum of association, if they choose to act as directors, are under a like obligation, still it does seem to me that it is not provided by Table A that, if the subscribers to the memorandum choose not to act themselves as directors, but simply to nominate others, they are under any obligation to meet for the purpose. What is required of them is, that they shall determine the number of the directors and the names of the first directors; and it seems to me that if all of them do in any way shew their determination on the subject, that determination ought to be treated as valid. This appears to have been the opinion of Lord *Hatherley*, when Vice-Chancellor, who says, in *Hallows* v. *Fernie* (1): "I very much doubt whether it is necessary that these persons should meet together. If any one of the subscribers to the contract"—that is, the memorandum

(1) Law Rep. 3 Eq. 520, 537.

of association—"raises a question, he may be entitled to say, I will not have this decided without a meeting of us all'; but if they all concur (as in this case) it seems to me hypercritical to say the appointment was irregular." That seems to me, if I may say so, excellent sense; and, in the absence of any authority which compels me to another conclusion, I shall act on it.

Now the authority which is relied on on the other side is the well-known case of *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (1). That was a case in which, there being more than three directors, three constituted a quorum, and the secretary, in order to affix the seal of the company to a document which was to bind the company, got three of the directors to attest the affixing of the seal, they not having met together, but being casually picked up, one after the other. It was held that that would not do. But, to my mind, that case is clearly distinguishable on two grounds. First of all, in that case only a quorum acted—and that is open to very serious observation. It is pointed out by Lord *Bramwell*, who took part in the decision, that if a quorum of three, not meeting together and not being regularly summoned, were to act, another quorum of three might meet in a different place and come to exactly an opposite conclusion; and therefore the government of the company by means of quorums so picked up would be impossible. It is also open to this serious observation, that the minority have no means of stating whether they assent to or dissent from the act proposed, and have no means of bringing their views before their colleagues if they do dissent. These are very serious objections to the validity of the procedure where only a quorum assent to the act; but where the whole body of directors act, or assent to the act, even though they do not meet, the validity of the act is not open to the same objections. Besides that, the reasoning of the various members of the Court was based upon this, that they found from the *Companies Clauses Act*, 1845, an obligation upon the directors, acting as directors, to meet and act jointly and as a board. I find here in Table A no such obligation as regards the subscribers to the memorandum of association when they act

(1) Law Rep. 2 Ex. 158.

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simply for the purpose of nominating the first directors. I think, therefore, the case cited does not govern the present.

Then another objection to the validity of the allotment is this. It is prescribed by article 58 of Table A, that at the first ordinary meeting after the registration of the company the whole of the directors shall retire from office; and it is said, therefore, that on the 20th of August, at the general meeting, which for the purpose I assume to have preceded the board meeting of the same date, they did retire. Well, what is the result of that? Article 61 provides that "the company at the general meeting at which any directors retire in manner aforesaid shall fill up the vacated offices by electing a like number of persons." What took place? I have read the resolution, and that seems to me to be a resolution which at all events is valid to this extent, that it continued in office the then present directors. It may be that part of that resolution was invalid, and that the directors could not be validly entrusted by a general meeting with the appointment of other or further directors in cases to which Table A did not apply; but it does seem to me that that is a sufficient expression of the will of the meeting that the then present directors who are named in that resolution should continue in office. Besides that, I think there is this further observation to make, that by article 62 it is provided that if at any meeting at which the election of directors ought to take place the places of the vacating directors are not filled up, the meeting is to stand adjourned; and if at the adjourned meeting such places are not filled up, the vacating directors, or those of them whose places are filled up, shall continue in office until the ordinary meeting in the next year, and so on until their places are filled up.

Now it is quite true that an adjourned meeting did not take place here, supposing that the resolution of the 20th of August was ineffective. But it seems to me that that portion of article 62 might very fairly be read as being a clause of the nature which is commonly described as directory only, and that the meaning of it is, that if for any reason either the first meeting, or the adjourned meeting at which the election of directors ought to take place, does not proceed validly to fill up the places of the vacating directors, then they are to continue in office. I think,

therefore, that three directors were validly in office on the 20th of August; two of those three made the allotment of the 200 shares; and it appears to me, therefore, that that allotment is binding.

Then the position with regard to the 300 shares is this. As I have already said, Mr. *Kennedy* admits that he applied for them and received an allotment letter. That is confirmed by the allotment book of the company, which, as he is a contributory, is evidence under sect. 154 of the *Companies Act*, and that book shews that the allotment was made on the 29th of September. It is true that there is no record of any board or committee meeting having been held on that day; but the minutes ceased to be kept after the 20th of August. The admission of Mr. *Kennedy*, coupled with the entry in the book, constitutes *primâ facie* evidence of the allotment, although there is no record of a board or committee meeting; and it has been held, among other cases, in *Knight's Case* (1), that the entry of a resolution in a minute is not essential to the validity of a resolution which is proved *aliunde*, even in a case of forfeiture, which, as we well know, must be proved in the strictest manner. It seems to me, in that state of things, that the burden of proof that a valid allotment was not made falls on Mr. *Kennedy*, and that he has not fulfilled that obligation. All that he has done is to point to the resolution under which *Smith* and *Fenwick* were authorized to allot the shares as applied for. There is no evidence that the resolution was acted upon, and there being at the time at all events three validly elected directors who were competent to make the allotment of 300 shares in September, I think that the onus which is thrown on the Respondent has not been fulfilled by him. I hold, therefore, that he must be retained on the list as a contributory in respect of 500 shares.

It only remains that I should deal with the costs. As to those, I must say that the business of this company does not appear to me to have been conducted in a regular manner, and that the records of the persons who acted as its directors have not been regularly kept. The document on which the validity of the acts of the directors depends was only produced at the last moment,

(1) Law Rep. 2 Ch. 321.

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and supplemental evidence was admitted by me in order to prove it. Under these circumstances, I think that the Respondent had good ground for strictly inquiring into the proceedings of the company, and, though I settle him on the list of contributories the only order which I make as to costs is that the Official Liquidator take his out of the assets of the company.

Solicitors *Trinders & Co.; W. H. Smith & Son.*

W. W. K.

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1890
Feb 5, 12.

In re REES.
WILLIAMS *v.* DAVIES.

[1889 R. 2075]

Will—Construction—Legacy—Gift to Next of Kin of Person dead at date of Will—Period of ascertainment of Class—Statute of Distributions—Lapse

A widow by her will bequeathed personal estate "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the *Statute of Distributions* had he died intestate and without leaving any widow him surviving" The statutory next of kin of the husband at the time of his death were *M S* and *R R* both of whom were alive at the date of the will, but *M S* died before the testatrix.—

Held, that the words "without leaving any widow him surviving" took the case out of the general rule laid down in *Wharton* v *Barker* (1) and that the persons to take must be ascertained, not at the death of the testatrix, but at the death of the husband, and consequently that there was a lapse as to the share of *M. S*

ADJOURNED SUMMONS.

The testatrix *Mary Rees*, by her will dated the 20th of December, 1881, recited that under the will of her late husband, the Rev. *Josiah Rees*, she was entitled to a life interest in his personal estate; that she was also absolutely entitled, as his widow, by virtue of the *Statute of Distributions*, to one-half of the *corpus* of his residuary personal estate; that he died on the 18th of July, 1881, that his personal estate at the time of his death, after payment of debts, amounted to £12,000 or thereabouts, that in 1853 she had lent her husband £1150, and that she was

(1) 4 K & J 483, 502

anxious that the property of her late husband should return to his own family. The testatrix then continued: "Now, therefore, I give and bequeath the sum of £4800 (which sum is equivalent to the moiety of my husband's personal estate to which I am absolutely entitled, after deducting the amount due from my husband to me as aforesaid)," and also certain plate, "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the *Statute of Distributions*, had he died intestate and without leaving any widow him surviving." The testatrix then, after making certain other dispositions, gave her residuary real and personal estate unto *Elizabeth Williams* and *Thomas Rhys Saunders* absolutely in equal shares.

By a codicil dated the 17th of September, 1885, the testatrix bequeathed a legacy, and in all respects ratified and confirmed her will. She afterwards made another codicil of an immaterial character, and she died on the 18th of October, 1888.

At the time of the death of the Rev. *Josiah Rees* in July, 1881, his statutory next of kin, exclusive of his widow, the testatrix, were his sister *Mary*, the wife of *George Saunders*, and his niece *Rosanna Rees*, and both these persons were living at the date of the will. Between the date of the will and the date of the codicil, viz., on the 16th of June, 1882, Mrs. *Saunders* died a widow and intestate, leaving *Thomas Rhys Saunders* and *Eliza Saunders*, her only children, her surviving; and *Rosanna Rees* and these two children of Mrs. *Saunders* were at the time of the death of the testatrix the sole statutory next of kin of the Rev. *Josiah Rees*.

After the death of the testatrix the question arose, whether the person or persons entitled under her will to the legacy of £4800 and the plate were to be ascertained at the death of the husband of the testatrix or at her own death; and there was a further question whether any portion of this legacy had lapsed.

This was an originating summons taken out by *Elizabeth Williams*, as one of the residuary legatees, against *Davies*, the executor of the will, *Rosanna Rees*, *Thomas Rhys Saunders* and *Eliza Saunders*, and asking for a declaration that upon the true construction of the will and in the events which had happened

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there had been a lapse as to one moiety of the legacy, and that by reason of such lapse such moiety had fallen into and became disposable as part of the residuary estate of the testatrix.

Hastings, Q.C., and *Peck*, for the Plaintiff:—

The period at which the husband's next of kin must be ascertained is the time of his own death. At that time there were only two next of kin, each of whom would have taken in moieties, and there is a lapse as to the moiety of one of them, Mrs. *Saunders*, by reason of her death in the lifetime of the testatrix. According to the general rules laid down in *Bullock* v. *Downes* (1), *Mortimore* v. *Mortimore* (2), and other authorities, in the ordinary case of a gift by will to the next of kin according to the statute of a person named, the term "next of kin" means the next of kin at the death of the named person. The question has generally arisen with reference to the next of kin of the testator himself; but it makes no difference in principle whether the next of kin are the next of kin of the person who makes the will or of somebody else.

In re Ham's Trust (3) is closely in point. There a testator directed a sum of money to be divided amongst the relations of his late wife "in such manner, shares, and proportions as would have been the case if she had died possessed of the said sums a spinster and intestate"; and it was held by *Kindersley*, V.C., that this was a direction that they should take in the manner, shares, and proportions prescribed by the statute, and that this could only be done if the will was read as a gift to all the relations of the wife as tenants in common; and, accordingly, that the shares of such of them as died before the testator lapsed. In that case there was a recital similar in character to the recital in this case of the testatrix's anxiety that her husband's property should return to his family.

Philps v. *Evans* (4) may be cited on the other side; but in that case there was nothing which amounted to a reference to the statute; and, as remarked in *Jarman* on Wills (5), the only

(1) 9 H. L. C. 1, 24, 25.
(2) 4 App. Cas. 448, 451.
(3) 2 Sim. (N.S.) 106.
(4) 4 De G. & Sm. 188.
(5) 4th Ed., vol. ii. p. 129, note (*n*).

question there was between the next of kin at the testator's death and those at the death of the tenant for life.

B. Eyre, for *Thomas Rhys Saunders*, took no part in the argument.

Beale, Q.C., and *Waggett*, for *Rosanna Rees*, the survivor of the two persons who were next of kin at the death of the husband :—

We contend that the time for ascertaining the person or persons to take is the death of the husband; but we submit that this is a gift to a class, and that there is no lapse, and that the survivor takes the whole legacy.

In *In re Ham's Trust* (1) there were words which prevented the legatees from taking as a class, and it is clear from the judgment of *Kindersley*, V.C. (2), that, without those words, he would have held the gift to have been a gift to a class, and that in such a case it would have taken effect in favour only of those who survived the testator.

The context here is clearly in favour of our contention: *Wharton* v. *Barker* (3).

Moreover, the will is expressly ratified and confirmed by the first codicil, which bears date the 17th of September, 1885, and this codicil either revives the will or operates as a fresh gift in favour of the next of kin then living.

Mrs. *Saunders* died on the 16th of June, 1882, *i.e.*, six months after the date of the will, and three years before the date of the codicil. The testatrix gives as her reason for the bequest her anxiety that her husband's property should return to his family; and the attempt of the Plaintiff to read in the reference to the statute, as in *In re Ham's Trust*, for the sake of shewing the shares in which the legatees are to take, and of bringing in a person whom the testatrix did not desire to benefit, does violence to the language which the testatrix herself has used.

Buckley, Q.C., and *T. C. Wright*, for *Eliza Saunders* :—

There was no lapse as to the share of *Mary Saunders*; and her children are entitled to share as next of kin of the hus-

(1) 2 Sim. (N.S.) 106. (2) 2 Sim. (N.S.) 111.
(3) 4 K. & J. 483, 502.

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band. There are three classes of cases as to the construction to be put upon gifts by will to next of kin. First, where the gift is to the testator's own next of kin, in which case the persons to take must, of course, be ascertained at the death of the testator; secondly, where the gift is to the next of kin of a person who is dead at the date of the will, or dies before the testator; and, thirdly, where the gift is to the next of kin of a person who is living at the death of the testator. The present case comes within the second class.

Philps v. *Evans* (1) and *Wharton* v. *Barker* (2) lay down the general rule and govern this case.

[They also referred to *Vaux* v. *Henderson* (3) and *In re Philp's Will* (4)].

Hastings, in reply, cited *In re Ranking's Settlement Trusts* (5).

1890. Feb. 12. STIRLING, J. (after stating the facts of the case, continued):—

At the death of the testatrix the persons entitled to her husband's estate under the *Statute of Distributions* were different from those who were entitled thereto under the same statute at his death; and the question has arisen whether those persons ought to be ascertained at the death of the husband or at the death of his widow, the testatrix. Now, the rule applicable to the case is thus stated by Lord *Hatherley* when Vice-Chancellor in *Wharton* v. *Barker*: "According to *Philps* v. *Evans*, a bequest to the next of kin of a person who is dead at the date of the will must, under ordinary circumstances, receive an interpretation analogous to that adopted in the case of a bequest to the testator's own next of kin, as regards the period of ascertaining who are the persons intended; and if there be nothing in the context to make the words applicable to a class to be ascertained at any other time than that of the testator's death, those who at the testator's death are the next of kin of the deceased person named in the will would naturally be the persons to take."

(1) 4 De G. & Sm. 188.
(2) 4 K. & J. 483, 502.
(3) 1 Jac. & W. 388, n.
(4) Law Rep. 7 Eq. 151.
(5) Law Rep. 6 Eq. 601.

This view of the law appears to be in accordance with the decision of Sir *William Grant* in *Vaux* v. *Henderson* (1), and of Lord *Romilly* in *In re Philp's Will* (2).

I have then to consider whether there is anything in the present case to take it out of the general rule; and it appears to me that the words, "without leaving any widow him surviving," are sufficient to do so.

One test appears to me to be conclusive. If the testatrix really contemplated that the class should be ascertained at her own death, it ought to be possible to insert in the gift words expressly defining this period, without making the language of the testatrix inaccurate as regards the grammar, or repugnant or inconsistent as regards the meaning; and I invited counsel to do so. The first suggestion was to insert the words "at my death" after "would," so that the clause would run, "to such person or persons as would at my death have become entitled to my said husband's personal estate under or by virtue of the *Statute of Distributions*, had he died intestate and without leaving any widow." Now this is not grammatically accurate. Strictly it ought to run, "to such persons as would at my death become entitled," &c. A more serious objection, however, is this, that the words "without leaving any widow him surviving" become unmeaning. The testatrix was her husband's widow, and at her death there could be no widow entitled to share under the statute upon an intestacy. It was then suggested that the clause ought to be read thus: "To such persons as would have become entitled to my said husband's personal estate, under, or by virtue of the *Statute of Distributions*, had he died immediately before me intestate, and without leaving any widow."

This hardly mends the matter; for in the first place it appears to me to add something to the language of the testatrix, and in the next place to make it really inconsistent. The testatrix was her husband's wife at the time of his death, and what she is really thus made to say is, "had he died immediately before me intestate, and without leaving me his widow him surviving." If words "immediately after me" were inserted after "died," then, no doubt, the language would be consistent; but the words

(1) 1 Jac. & W. 388, n. (2) Law Rep. 7 Eq. 151.

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"without leaving any widow" would be superfluous; for it can hardly be supposed that the testatrix contemplated the possibility of her husband marrying again in the brief interval between her own death and his.

On the other hand, if the words "at my husband's death" are inserted, so that the clause is read, "to such person or persons as would, at my late husband's death, have become entitled to my said husband's personal estate under or by virtue of the *Statute of Distributions*, had he died intestate and without leaving any widow," the language of the will becomes both grammatical and self-consistent, and every word has its natural force and meaning.

I am of opinion, therefore, that the persons to take are to be ascertained at the husband's death.

Now it is laid down in *Bullock* v. *Downes* (1) that, where there is a gift to persons entitled under the *Statute of Distributions*, the statute regulates the interest taken as well as the parties to take; and further, that the rule applies even where the persons to take are not all the next of kin according to the statute, but are only such with the exception of some particular member of the class.

That case related to a gift to persons entitled under the *Statute of Distributions* to the personal estate of the testator, and no case has been cited in which it has been applied to a gift to the statutory next of kin of a person dead at the date of the will; but I can see no valid ground for drawing any distinction. In my opinion, therefore, the gift must be read—to "such persons as would at my husband's death have been entitled to his personal estate under the *Statute of Distributions*, had he died intestate and without leaving any widow him surviving, in the shares and proportions in which they would have taken under that statute."

I also think that, as was held in *In re Ham's Trust* (2), and for the like reasons, there is an intestacy as regards the share of that one of the husband's next of kin who died in the lifetime of the testatrix.

It was indeed suggested that the first codicil revived the will, or operated as a fresh gift in favour of the next of kin then living. Even if the language admitted of such a construction

(1) 9 H. L. C. 1, 22, 23. (2) 2 Sim. (N.S.) 106.

(which I do not think it does), there is no evidence that the testatrix knew who her husband's next of kin were, or that any of them had died.

I shall accordingly make a declaration as asked by the summons.

Solicitors: *G. L. P. Eyre & Co.*, agents for *Morgan Richardson, Cardigan; Clarke, Rawlins & Co.*, agents for *Barker, Morris & Barker, Carmarthen.*

W. W. K.

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April 18.

In re THOMPSON AND HOLT.

[1890 T. 83.]

Vendor and Purchaser—Mortgage—Building Society—Power of Sale—Notice—Waiver—Title—Mortgagor's Title—Conveyance—Contract to buy under Power of Sale—Confirmation—Validity of Title—Conveyancing and Law of Property Act, 1881, *s.* 19, *sub-s.* 1 (i), *s.* 20, *sub-s.* (i).

A mortgage of leaseholds to the trustees of a building society, in the ordinary form of a building society mortgage, contained a covenant by the mortgagor to pay, as required by the rules of the society, all subscriptions, &c., in respect of his shares in the society, and also a declaration that, in case of default, the total sum for which the mortgage should be for the time being redeemable according to the said rules and the mortgage, should be considered as then actually due, and that the power of sale given to mortgagees by the *Conveyancing and Law of Property Act*, 1881, should apply. On the same day the mortgagor executed a second mortgage of the property to his bankers. The mortgagor subsequently became bankrupt; and the second instalment of subscription under the first mortgage being in arrear, the first mortgagees, a fortnight after the day on which the instalment had become due according to the rules of the society, and without any formal notice to the second mortgagees or the mortgagor's trustee in bankruptcy, though with their knowledge and consent, put up the property for sale by auction subject to conditions of sale which stipulated that the purchaser should accept a conveyance from the vendors under their power of sale, without the concurrence of any other persons. The property not being sold at the auction, the first mortgagees, within three months from the date when the second instalment became due, and with the approval of the second mortgagees, sold the property by private contract, subject to the original conditions of sale. Upon the purchaser's requisition the mortgagor's trustee in bankruptcy consented to join in the conveyance; but subsequently the purchaser raised the objection that the first mortgagees could not make a title at all, as their power of sale was not exercisable until three months' notice had been first given under sect. 20 sub-s. (i) of the *Conveyancing Act*. Upon a summons by the purchaser under the *Vendor and Purchaser Act*, 1874, the Chief Clerk made an order declaring that the vendors had shewn a good title according to the conditions of sale. The vendors had, after being served with the summons, offered to procure the concurrence of the second mortgagees in the conveyance, in addition to that of the mortgagor's trustee in bankruptcy, and the second mortgagees had expressed their willingness to concur. The purchaser moved to discharge the Chief Clerk's order on the ground that the power of sale was not exercisable for want of the three months' notice under the Act, and that he could not be required to accept a title from the second mortgagees, as offered by the vendors, since it had been

stipulated by his contract that he should take a title from the first mortgagees only:—

Held, that the conveyance by the first mortgagees would not be the less a conveyance by them under their power of sale, according to the contract, because the second mortgagees, either by the same or a separate deed, concurred in or confirmed the conveyance by passing such interest as they might have; and that the second mortgagees and the mortgagor's trustee in bankruptcy had in effect waived the notice required by the Act.

The Chief Clerk's order was accordingly affirmed with a preface that the second mortgagees and the trustee in bankruptcy were willing to concur in the conveyance or otherwise to confirm the sale, and that the vendors were ready and willing to procure such conveyance and confirmation at their own expense. Motion to discharge refused with costs.

What is "waiver" of notice, discussed.

Selwyn v. *Garfit* (1) considered.

JAMES HUMPHREY BROWN, a borrowing member of the *Second Equitable Permanent Benefit Building Society*, executed a mortgage to the society to secure the amount of an advance. By that mortgage, which was dated the 29th of March, 1889, and made between *Brown* (thereinafter called "the mortgagor") of the one part and the trustees of the society (thereinafter called "the mortgagees") of the other part, the mortgagor, in consideration of the sum of £5000 therein expressed to be paid to him out of the funds of the society as an advance of the ultimate value of his 100 shares therein, covenanted with the mortgagees to pay, as required by the rules of the society, all moneys which, according to the said rules, should be payable by way of subscription, fines, or otherwise, in respect of the said shares, and also to observe the rules of the society; and that if the mortgaged premises should be sold under the power thereinafter or by any other means conferred upon the mortgagees and the proceeds should be insufficient to satisfy the total sum for which the mortgage should be redeemable according to the said rules and the mortgage, or if any buildings comprised in the mortgage should be destroyed or damaged by fire and not rebuilt or restored within six months, or if the mortgagees should be evicted or ejected from the mortgaged premises by adverse title, then and in any of such cases, and immediately upon the happening thereof, the mortgagor would pay to the mortgagees the total

(1) 38 Ch. D. 273.

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sum for which the mortgage should then be redeemable according to the said rules and the mortgage. And the mortgagor thereby, as beneficial owner, demised and conveyed certain leasehold promises at *Torquay* to the mortgagees, subject to a proviso for redemption on observance and performance of the mortgagor's covenants thereinbefore contained. And the mortgage contained a declaration that, if default should be made in the performance or observance of any of the covenants thereinbefore contained, then and in such case the total sum for which the mortgage should be then redeemable according to the said rules and the mortgage should be considered as then actually due and payable, and the power of sale and other powers, rights and remedies given to or conferred upon mortgagees by the *Conveyancing and Law of Property Act*, 1881, or any other statute, or otherwise, should apply to that mortgage and should vest in and be exercisable by the mortgagees accordingly.

By rule 41 of the rules of the society it was provided that every member should pay a subscription of 12*s.* 6*d.* per share per quarter, and so in proportion in respect of any fractional part of a share, until he should require an advance; that upon requiring an advance he should pay an additional subscription of 12*s.* 6*d.* per share per quarter, and so in proportion for any fractional part of a share, to commence from the time of the money being ready for him; which increased subscription should entitle such borrowing member to receive an advance of the full ultimate value of his shares on security of freehold, leasehold or copyhold property. And rule 42 provided that every subscription should commence either from the first Thursday in January, April, July or October in the current year.

On the same date as the above-mentioned mortgage *Brown* executed a second mortgage of the leaseholds to his bankers. The first instalment of subscriptions under the first mortgage payable on the first Thursday in April, 1889, was paid in advance at the date of the mortgage by the trustees deducting it from the amount payable to the mortgagor, so that no further instalment was payable till Thursday the 4th of July.

On the 14th of June, 1889, *Brown*, the mortgagor, was adjudicated a bankrupt, and a trustee of his estate was appointed. On

the 18th of July following, the second instalment under the first mortgage being then unpaid, the trustees of the society, without any formal notice to the second mortgagees or to *Brown's* trustee in bankruptcy, but with their knowledge and consent as expressed in letters to the society's solicitors, put up the mortgaged property, together with other property, for sale by auction, subject to printed conditions of sale, of which the 9th was as follows:

"The vendors being mortgagees selling under a power of sale, the assignments shall be accepted from them under such power without the concurrence of any other person or persons, and no covenants for title shall be required except the statutory covenant implied by expressing in the conveyance to the purchaser that the vendors convey as mortgagees."

The mortgaged property not being sold at the auction, the trustees, on the 25th of September, 1889, with the approval of the second mortgagees, but without any formal notice to them, entered into a contract for the sale of the property to *John Holt* for £4250, subject to such of the original conditions of sale as were applicable to a sale by private treaty, including the ninth condition, and to a further condition that the vendors should allow the whole purchase-money to remain on mortgage of the premises at 5 per cent. interest. On investigating the title the purchaser required that *Brown's* trustee in bankruptcy should concur in the assignment, whereupon the vendors obtained the trustee's consent so to do. The purchaser's solicitors then prepared the draft assignment making *Brown's* trustee a party, and the draft was approved on behalf of the trustee as well as of the vendors. Subsequently, however, the purchaser raised the objection that the vendors could not exercise their power of sale at all on the ground that, as the unpaid second instalment under the mortgage did not become due until the 4th of July, 1889, the three months' notice required by sect. 20 of the *Conveyancing and Law of Property Act*, 1881, could not have been given to the mortgagor's trustee in bankruptcy or to the second mortgagees prior to the date of the contract for sale. Accordingly, the purchaser's solicitors, on the 9th of December, 1889, wrote to the vendors' solicitors repudiating the contract; but as the vendors insisted on its validity, the purchaser, on the 16th of January,

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1890, took out a summons under the *Vendor and Purchaser Act*, 1874, to have it declared that the vendors had not made out a good title to the property. The vendors' solicitors subsequently wrote stating that the second mortgagees were willing to join in the assignment, and that their concurrence would be procured, but the purchaser's solicitors declined to assent to the proposal unless the vendors paid the costs of the summons and also all costs to be occasioned by the concurrence of the second mortgagees. The vendors' solicitors, however, declined those terms, and the summons came on before the Chief Clerk to Mr. Justice *Kay* on the 17th of March, 1890, when he made an order declaring that a good title had been shewn in accordance with the conditions of sale embodied in the contract, but gave no costs to either party.

The purchaser now moved to discharge that order, and to have it declared that a good title had not been shewn.

The motion was heard by Mr. Justice *Kekewich*, for Mr. Justice *Kay*.

It appeared from the evidence that *Holt*, the purchaser, had, prior to the date of his contract, investigated the vendors' title, and was at that date fully conversant with all the facts and circumstances above stated, except the fact that the first instalment under the first mortgage had been paid by the same being deducted from the amount of the advance.

H. Terrell, for the purchaser:—

The first question that arises is a general one, namely, whether the power of sale given by sect. 19 of the *Conveyancing and Law of Property Act*, 1881, and purporting to be incorporated in this mortgage deed by reference, is applicable to a mortgage to a building society to secure subscriptions by an advanced member; but I admit that the question is disposed of in the present case by the declaration in the mortgage that, if default should be made in the performance of any of the covenants, the total sum intended to be secured should be considered as then actually "due," which satisfies the requirements of sub-sect. 1 (i.). But although the statutory power of sale does apply in this case, yet the three months' notice required by sect. 20 as a condition pre-

cedent to the exercise of the power of sale has not been given. In fact, no notice at all has been given, as the vendors admit; and, having actual knowledge that no notice was given, I am not protected by sect. 21, sub-sect. 2: *Parkinson* v. *Hanbury* (1); *Selwyn* v. *Garfit* (2).

Moreover, the vendors now wish us to accept, not the title which we contracted for, namely, the title under the power of sale, but a different title, namely, from the second mortgagees. To that we object, as it would throw upon us the expense of investigating a new title. We make no objection on the ground of the concurrence of the trustee in bankruptcy, because we have already inserted him in the draft assignment as a party.

It has been decided in *In re Bryant & Barningham's Contract* (3), that where a purchaser has contracted to buy under a power of sale, he cannot be compelled to accept a title under the beneficial interest. I submit, therefore, that I am not bound to accept the title now offered.

Rowden, for the vendors:—

I submit that the concurrence of all parties interested in the equity of redemption removes all difficulty as to want of sufficient notice. But notice has been distinctly waived by the consent of the trustee in bankruptcy and the second mortgagees to the exercise by the first mortgagees of their power of sale; and actual evidence of waiver, that is, of "consent to dispense with the notice," is a sufficient answer to an objection that the usual notice required to be given before the exercise by a mortgagee of his power of sale has not been given: *Selwyn* v. *Garfit* (4). There cannot be better evidence of waiver than the consent of the parties entitled to notice to join in a conveyance by the mortgagee under his power of sale. *In re Bryant & Barningham's Contract* does not apply, for there the proposal was that the purchaser should buy under an entirely new contract with the beneficial owner; but here we do not ask the purchaser to enter into any new contract, since we are still selling under our power of sale; and all we propose is that the owners of the equity of

(1) 1 Dr. & Sm. 143.
(2) 38 Ch. D. 273.
(3) Ante, p. 218.
(4) 38 Ch. D. 273, 283, 284.

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redemption shall confirm the sale. Sect. 20, sub-sect. ii., of the *Conveyancing Act* provides that a mortgagee may exercise his power of sale if two months' interest is in arrear; but it may be said that the instalments under a building society's mortgage are not "interest."

Terrell, in reply:—

If a consent to confirm by concurring in the sale is relied on as a waiver of notice, that is not sufficient, for the waiver should be before, and not after, the exercise of the power of sale. If mortgaged property is sold under the power of sale in the mortgage before the expiration of the time within which the mortgagor is entitled to notice, the title is clearly bad, and cannot be forced on a purchaser. What the vendors now offer is a title from the persons entitled to the equity of redemption, whereas our contract is to buy from the mortgagees alone. That is the title we contracted to take. A purchaser cannot be compelled to take more than he has bargained for: *In re Banister* (1). It was not until after we repudiated the contract and took out the summons that the vendors offered us a different title altogether. We ought not to be compelled to accept a different title, which will involve us in the expense of a fresh investigation and a fresh conveyance.

[*Rowden*:—I admit that the concurrence of the other parties must be obtained at our expense.]

KEKEWICH, J.:—

Several points have been raised on this motion, one of them being a point of some importance. The purchaser insists that the power of sale conferred by the *Conveyancing Act* is not applicable to a building society's mortgage in the ordinary form, and that, where you have a mortgage in that form, and no express power of sale, there is no possibility of a sale by the mortgagee.

That is a point which I do not deal with, because here there is an express proviso in the mortgage that the power of sale con-

(1) 12 Ch. D. 131, 145.

tained in the *Conveyancing Act* shall arise in certain instances, one of which has happened; and, therefore, whether the power be incorporated by the statute or not, it is incorporated by force of the contract between the parties; and accordingly, there being such a power of sale, it became exerciseable immediately on the July instalment not being paid. About that, on the construction of the instrument, there can be no doubt whatever.

But then it is said that, treating the power of sale as applicable, it cannot properly be exercised until after three months from the day on which the July instalment became due, and that as that period had not expired at the date of the contract—as undoubtedly it had not—the power of sale was not well exercised. The *primâ facie* answer to that is, that the restriction on the exercise of the power of sale is for the benefit of the mortgagor, as between himself and the mortgagee. But in this case the purchaser had notice of this fact, and therefore that argument is not very material.

Then arises the point to which I have referred as being one of some importance. The mortgagor has become bankrupt. The trustee in bankruptcy has already agreed to be and has been made a party to the conveyance. In addition to the mortgagor's trustee in bankruptcy, the concurrence of other parties is required, namely, the second mortgagees. But it appears that the second mortgagees are also willing to concur in the conveyance or otherwise to join in the sale. Mr. *Terrell*, however, insists that, though with the concurrence of these parties he might possibly get a good title, it would not be the title for which he has contracted, and that he has a right to the title he has contracted for, and no other. What he has contracted for is a title under the mortgage by a conveyance from the first mortgagees only, with no other parties to that conveyance. So far as that small point is concerned, that difficulty can of course be got over by the second mortgagees and the trustee in bankruptcy of the mortgagor confirming the sale by separate deeds; and therefore I pass that over. But a more important question to consider is whether the purchaser will not, as regards title, really get something else than what he has contracted to take. Mr. *Terrell* says that, in the events which have happened, and under the circum-

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stances, what he will really get is a conveyance by the mortgagees and the owners of the equity of redemption, and that that is not a conveyance by the mortgagees under their power of sale. To my mind that proceeds on an incorrect notion of the function of a power of sale in a mortgage deed.

These mortgagees will exercise their power of sale; they will exercise their power as mortgagees, and they will enter into such covenants as are usually entered into by mortgagees. It will not make any substantial difference that other parties who have some interest in the property are also made parties and confirm the conveyance. If they convey, their conveyance will pass such interest as they have. If they confirm by an independent document, they will confirm what has been already done. In either event the sale will be made by the first mortgagees under their power of sale. It seems to me, therefore, that the objection that a different title is made falls to the ground. It is the same title, although with some modifications in the words of the conveyance.

Then it is said that there was no waiver of the notice of this sale. That is not a very accurate though it is a convenient form of expression. In other words, what is meant is, that the owners of the equity of redemption, the second mortgagees, and the trustee in bankruptcy, did not get the notice which by the 20th section of the *Conveyancing Act* was stipulated should be given to them. I am not sure that they did waive that notice in the sense in which the term "waiver" has been used. It appears that they were consulted with respect to a sale by public auction of this property, and that the second mortgagees at all events were informed of the proposed sale by private contract. I am by no means satisfied that those parties have "waived" the notice in the strictest sense of the word; but in the sense in which Lord Justice *Bowen* uses the words in *Selwyn* v. *Garfit* (1)—that waiver is consent to dispense with notice, and that what is either waiver or an equivalent to waiver may exist in different circumstances—I think there was a waiver.

It is quite competent to a mortgagor to say after a sale, "True it is that I have not had notice, but I am not going to insist

(1) 38 Ch. D. 284.

upon that; I accept the sale under the power, and I shall not interfere to prevent the completion of the sale or to impeach the title." That may not be strictly a waiver in the sense of a waiver of notice, but it is a waiver by the mortgagor of his right to insist that notice was not given. It is in fact but little more than a mere question of words when it is said this is not waiver in the proper sense. Here the parties entitled to notice have been willing and are willing to come forward and say, "We will convey and confirm this sale." That being so, it seems to me that there is nothing open to the purchaser to object to. He will get a perfectly good title according to the contract, any difficulty being removed by the concurrence and confirmation of the second mortgagees and the trustee in bankruptcy, and he will get his title, as I have already held, under the power of sale.

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If I had drawn the order in Chambers, and my attention had been called to this point, I should have prefaced the declaration of a good title with some words, such as I will read directly, to shew under what circumstances the order was made. The declaration is in itself sufficient, though it might have been better if it had been prefaced with some such words as I have indicated.

I asked Mr. *Rowden* whether, on behalf of the vendors, his clients were willing to procure the concurrence of these persons at their own cost, and he admitted that they were bound to do so. If that concurrence is necessary to supply a defect in their title as mortgagees, that defect must be remedied at their own cost. If the purchaser is not satisfied that the persons who give their consent are second mortgagees, then the vendors, in procuring the concurrence of the second mortgagees, must produce satisfactory evidence that they are the second mortgagees; but that must not be an excuse for throwing on the vendors costs which they ought not to be called upon to pay.

I shall refuse this motion, leaving the order of the Chief Clerk as it stands, but prefacing it by the following words, which might have been conveniently inserted when the order was made:—

"It appearing that the second mortgagees (naming them) and the trustee in bankruptcy of the mortgagor (naming him) are

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willing to concur in the conveyance to the purchaser, or otherwise to confirm the sale to him, and that the vendors are ready and willing to procure such concurrence and confirmation at their own expense." Then the motion will be simply refused and the purchaser will be ordered to pay the costs of the motion.

Solicitors: *Lumley & Lumley; Prideaux & Sons,* for *J. R. Poole & Son, Bridgwater.*

G. I. F. C.

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[1889 C. 169.]

Public-house—Lease—Lessee's Covenants—Restrictive Covenant—Covenant not to buy Beer except from Lessor or his Assigns—Covenant running with the Land—Assignment of Public-house and Covenant.

Messrs. *A. & B.*, who were brewers, and also dealers in ale and stout, carrying on their business at the *X. Brewery*, demised a public-house to the Defendant by an indenture of lease, in which the term "lessors" was defined to include each of the Messrs. *A. & B.*, "and their each and every of their heirs, executors, administrators, and assigns," and the term "lessee" was defined to include the "executors, administrators, and permitted assigns" of the lessee.

The lease contained a covenant by the lessee with the lessors that he would not during the term, directly or indirectly, buy, sell, or dispose of upon the premises any ales or stout "other than such as shall have been *bonâ fide* purchased of the said lessors, or from them or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them, provided they or he shall at such time deal in or vend such liquors as aforesaid and be willing to supply the same to the lessee of good quality and at the fair current market price."

A. & B. afterwards sold and assigned their brewery, plant, business, and goodwill to *C.*, a brewer carrying on business at the *Y. Brewery*, and assigned to him the public-house and the benefit of the covenant with reference to the sale of beer. About the same time *A. & B.* dissolved partnership, and ceased to carry on business at the *X. Brewery*, which was shortly afterwards shut up.

The Defendant did not take his beer from *C.*, and in an action brought by *A.*, *B.*, and *C.*, as co-Plaintiffs, to restrain the Defendant from selling any beer other than beer purchased from *C.*, either directly or through *A. & B.*, the Vice-Chancellor of the County Palatine Court of *Lancaster*, after holding that *A. & B.*, having ceased to carry on business, were not entitled to relief, granted an injunction in favour of *C.* in the terms of the covenant.

On appeal by the Defendant, it was *held* by the Court:—

First. Upon the construction of the covenant, that the benefit of it was not restricted either to assigns carrying on the same brewer's business as the lessors, or to assigns who themselves made beer.

Secondly. That the covenant was not a personal covenant incapable of assignment, but a covenant relating to the way in which the business at a particular house was to be carried on, and accordingly a covenant running with the land, and enforceable by the owner of the reversion on the lease.

Thirdly. That whether the covenant was one running with the land or

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not, the Plaintiff *C.*, as assignee of the benefit of it, was, according to the principle of *Tulk* v. *Moxhay* (1), entitled to enforce it, upon the ground that the Defendant, having presumably obtained a lease of the house at a lower rent by reason of the restrictive covenant, ought to be restrained from dealing with the house in a way inconsistent with that covenant.

In adjudicating upon covenants in the nature of restrictive covenants, where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the Court will in a proper case enforce the negative portion of the covenant.

Doe v. *Reid* (2) and *Haywood* v. *Brunswick Permanent Benefit Building Society* (3) distinguished.

Dictum of *Baggallay*, L.J., in *Lybbe* v. *Hart* (4) questioned.

APPEAL from a decision of the Vice-Chancellor of the County Palatine Court of *Lancaster*.

At the date of the lease hereinafter mentioned, Messrs. *Clegg & Wright* carried on business at the *Alton Brewery*, *Toxteth Park*, *Liverpool*, as brewers and buyers and sellers of ale and stout, and were the owners of a leasehold public-house at *Toxteth Park*, called the *Alexandra Hotel*, for a term of thirty-one years from the 1st of October, 1885.

By an indenture of lease dated the 19th of November, 1886, and expressed to be made "between *James Clegg* and *Peter Wright*, both of *Toxteth Park*, in the county of *Lancaster*, brewers (hereinafter called the lessors, including in such term each of them, and their each and every of their heirs, executors, administrators, and assigns), of the one part, and *Benjamin Hands* of *Bootle*, in the said county, licensed victualler (hereinafter called the lessee, including in such term his executors, administrators, and permitted assigns), of the other part," in consideration of £700, the lessors demised the *Alexandra Hotel* to the lessee from the 21st of November, 1886, for nine and a half years, at the yearly rent of £100, and, subject to certain covenants, agreements, and conditions, amongst which were covenants by the lessee with the lessors that he, the said lessee, would pay the rent to the said lessors, and would use and occupy the demised premises as and for an inn, tavern, or public-house only, and conduct the same and the business thereof in a proper and orderly manner, and

(1) 2 Ph. 774.
(2) 10 B. & C. 849.
(3) 8 Q. B. D. 403.
(4) 29 Ch. D. 8.

would use his and their best endeavours to extend the custom and business of the demised premises, and would keep open the said premises for the sale of ales, wines, spirits, and other exciseable articles or liquors, at all times allowed by law; and also that he, the said lessee, would not transfer or remove any licenses or grants from the demised premises, but should and would, at the determination of the term, deliver them up to the lessors, and execute all documents for the purpose of transferring such licenses and grants, and all renewals of them, to the lessors; and then followed the restrictive clause upon the construction of which the question chiefly turned, which was in these terms: "And further, that he, the said lessee, will not at any time during the continuance of this demise, buy, receive, sell, or dispose of either directly or indirectly, or permit to be bought, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said demised premises or any part thereof, any ales or stout (other than best stout) other than such as shall have been *bonâ fide* purchased of the lessors, or from them or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them, provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the lessee, of good quality and at the fair current market price thereof."

On the 8th of July, 1889, *Clegg & Wright* agreed to sell and assign all their brewery, plant, goodwill, and business to *Robert Cain*, a brewer carrying on business at the *Mersey Brewery, Liverpool*, and in carrying out the sale *Clegg* and *Wright*, by an indenture dated the 2nd of October, 1889, assigned to *Cain* the *Alexandra Hotel*, with the full benefit of the rents and covenants contained in the lease of the 19th of November, 1886, and in particular with the full benefit and advantage during the continuance of the term of nine and a half years of the restrictive covenant above set forth.

On or about the 2nd of October, 1889, *Clegg & Wright* dissolved partnership, and retired from business, and the *Alton Brewery* was shut up, and afterwards offered for sale without any restriction as to its being occupied as a brewery.

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Cain was a brewer of ale and stout, and also a dealer in other ales; but *Hands* declined to purchase any ale or stout from him, and *Clegg & Wright* and *Cain* brought this action against him in the County Palatine Court of *Lancaster*, and claimed an injunction to restrain him from buying, receiving, selling, or disposing of in or about the *Alexandra Hotel* any ales or stout (other than best stout) other than such as should be *bonâ fide* purchased of the Plaintiff *Cain*, either directly or through the Plaintiffs *Clegg & Wright*, and from in any way committing a breach of the restrictive covenant above set forth.

Interrogatories were delivered to the Defendant *Hands* by the Plaintiffs; and the affidavit filed by the Defendant in answer to such interrogatories contained the following paragraph: "I never ordered from or asked the Plaintiff *Robert Cain* to supply me with any ales or stout."

The Vice-Chancellor of the County Palatine Court gave judgment in the action on the 20th of December, 1889 (1), and

(1) BRISTOWE, V.C. (after holding that, as *Clegg & Wright* had parted with their brewery, given up brewing, and retired into private life, they were not entitled to any relief by way of injunction against *Hands*; and, after disposing of certain contentions which were raised for the defence upon points not material for the purposes of this report, proceeded as follows):—

It therefore comes to be a question, What are Mr. *Cain's* rights in the matter? Now, first of all we have to deal with the nature of the covenant itself; and upon that point I would venture to observe that, whether such a covenant is or is not one which might be injurious to the general public in case a brewer was rich enough to buy up every public-house in a district and then to say to the public, "You shall drink my beer or no other beer by means of these ties" —I say that whether these covenants were or were not wise covenants in the first instance, they have long been inserted in documents of this kind; they have frequently come before the Court, and have been supported by various decisions. It is not for me, therefore, to determine any case upon the question of these ties by brewers. It is for the Legislature, if it thinks fit, to make such alterations in the law as may be required for the benefit of the public. Until that is done I have merely to administer the law as it stands, and on this point I shall only refer to the observations of the Lords Justices in *Catt* v. *Tourle* (Law Rep. 4 Ch. 654). In that case *Selwyn*, L.J., said (Law Rep. 4 Ch. 659): "We should be introducing very great uncertainty and confusion into a very large and important trade if we were now to suggest any doubt as to the validity of a covenant so extremely common as this is." And again, Lord Justice *Giffard* in the same case said (Law Rep. 4 Ch. 661): "It is said that this covenant is un-

granted the Plaintiff *Cain* an injunction to restrain the Defendant, his agents, servants, and workmen, from buying, receiving,

certain, which it clearly is not. Nothing can well be more certain than that a man is to have the exclusive right of supplying a particular public-house with ale, beer, and porter." Then, after quoting cases decided in favour of such a covenant, he added: "Lastly, with respect to this covenant being invalid by reason of its being in restraint of trade, it does not go beyond the ordinary brewer's covenant, except in this particular, viz., that the ordinary brewer's covenant is generally between lessor and lessee, or mortgagor and mortgagee, whereas the present covenant is between the vendor and purchaser of the fee. This difference does not make the covenant void." I only refer to those two observations of many which could be cited to shew that it is too late now to enter into the question whether these covenants are or are not covenants which could be challenged as being bad in the nature of restraint of trade, or bad as against the general public and in favour of a particular class of individuals I think it must be held that these covenants are enforceable, can be enforced, and in right should be enforced

Then comes the further question, Can *Cain* as the assign of *Clegg & Wright* enforce his contract against the Defendant *Hands*? And that involves the question, so ably argued by Mr. *Collins*, whether covenants of this kind do or do not run with the land. Now there is certainly some peculiarity in the form in which the lease is granted, as if the intention was to cover every possible legal mode of transfer that could be suggested First of all, the term "lessors" is to include each of the lessors and their each and every of their heirs, executors, administrators, and assigns, and that seems to include everything that could be except a possible future partnership, and that future partnership is, I think, contemplated in the terms of the covenant itself. But that future partnership never did arise, and the question I have to deal with only relates to the assigns of the lessors Now Mr *Collins'* argument was, I think, based upon this, that all restrictive covenants of this kind are more or less to be looked upon as *reddenda*, and if so they may be divisible into two classes, one collateral with the land and one touching or of the land, and the distinction is of course a very difficult and narrow one. I think, taking it as a theoretical question, the result of the cases only comes to this, that the question whether a covenant does or does not run with the land must depend on whether it does or does not, I think the proper term is, "touch the land", in other words, whether it is collateral to or an integral part of the enjoyment of the land Well, I have gone carefully through all the authorities, and I do not think that the question here turns upon whether the covenant does or does not run with the land I think it turns entirely upon the equitable question, whether a party who enters into a contract of which he gets the benefit can take that benefit and yet refuse to bear the burden. I think it falls within the class of cases which decide that if a man who has had a distinct contract offered to him *sub modo* chooses to take the property with the restriction and refuses to give effect to it, a Court of Equity will

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selling, or disposing of either directly or indirectly, or permitting to be bought, received, sold, or disposed of either directly or

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afterwards be against him, and still more against anybody else who had notice, and will be in favour of any body who for the time being shall be entitled to the benefit of that contract I think that, irrespective of all those old cases to which my attention was called and other cases, the real question is whether there is here a legal contract capable of being enforced, and whether it ought or ought not to be enforced in equity

Now the case of *Tulk* v *Moxhay* (2 Ph 774), which may be taken first as one of the leading cases upon the law as to vendor and purchaser in regard to the sale of land, shews that a legal contract for value will be enforced in equity against a subsequent purchaser, independent of the question whether it is one which runs with the land I will follow that with the case to which I have already referred, *Catt* v. *Tourle* (Law Rep 4 Ch 654) There the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land society, who covenanted with him that he, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected on the land, but the plaintiff did not enter into any covenant to supply it It was a negative covenant The defendant, a member of the society, was also a brewer, he acquired a piece of land, with notice of the covenant, and erected upon it a public-house, which he supplied with his own beer The plaintiff filed his bill to restrain the defendant from supplying beer, alleging that the plaintiff had always been ready to furnish a supply of good beer at a fair price Upon a demurrer, Vice-Chancellor *Stuart* held that the covenant was not void either for uncertainty or want of mutuality, or as being an unreasonable restraint of trade Lord Justice *Selwyn*, in his very full judgment on the case in the Court of Appeal, says (Law Rep 4 Ch 656) "Many objections have been raised to the legality of this covenant, and to the jurisdiction of this Court to enforce such a covenant, or, at all events, to the propriety of the Court's interfering to grant the relief which is sought and it has been said that, even if the plaintiff has any right, he ought to be left to assert that right in a Court of Law In the first place, I think it needless to consider the question which has been discussed, whether covenants of this nature run with the land In *Tulk* v *Moxhay* (2 Ph 774, 778) Lord *Cottenham* says 'That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased'" Then he refers to *Wilson* v *Hart* (Law Rep 1 Ch 463), and continues (Law Rep 4 Ch 657) "This is a covenant entered into as a part of the transaction on the sale and purchase of a piece of land, and what the vendor stipulates for is that he shall have the exclusive right of supplying all ale, beer, and porter which shall be consumed in any building erected on this particular piece of land which shall be used as a beerhouse This is a right which is capable of being abused, capable of being waived, capable of being lost,

indirectly in or about the *Alexandra Hotel* any ales or stout (other than best stout) other than such as should be *bonâ fide* purchased

and if at any time, either in the progress of this suit or any other time, it can be shewn that it has been so abused, so waived, or so lost, then there would be good ground for saying that this Court ought not to interfere in favour of a person who might otherwise be entitled to the benefit of it. But I am at a loss to see how it can be said that there is anything like uncertainty in this covenant." Then he refers to *Collins* v. *Plumb* (16 Ves. 454) on the point of uncertainty, and then deals with the question of want of mutuality, and holds that it is sufficiently mutual.

Then in regard to the third objection, that the covenant was an unreasonable restraint of trade, he refers to *Mitchel* v. *Reynolds* (1 P. Wms. 181) and to *Wilson* v. *Hart*, and after making the observation that I have already referred to, he says (Law Rep. 4 Ch. 659): "I think there is no ground for the distinction which has been contended for, namely, that such a covenant might be good in a lease for 21, 50, or 100 years, but is not good if entered into as part of a transaction where the fee simple of a property is conveyed. I think, therefore, that none of the objections taken to the covenant can be sustained, especially at the present stage of this cause." That was with reference to the demurrer. Lord Justice *Giffard* gives a shorter judgment, entirely concurring with that of Lord Justice *Selwyn*, and holds that the demurrer was properly overruled in the Court below.

Now it is quite clear that if it had been a covenant entered into upon a lease instead of a covenant entered into upon a sale, the decision would have been the same. Again, in *Hall* v. *Ewin* (37 Ch. D. 74), where the relief was not given, Lord Justice *Cotton* said (37 Ch. D. 79), "As I understand *Tulk* v. *Moxhay*, the principle there laid down was that if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the Court of Chancery could not allow him to use the land in contravention of the covenants. That is a sound principle. If a man buys land subject to a restrictive covenant, he regulates the price accordingly, and it would be contrary to equity to allow him to use the land in contravention of the restriction"; and Lord Justice *Lopes* in the same case said (37 Ch. D. 82): "According to the decision in *Tulk* v. *Moxhay* a Court of Equity will not permit property to be used in a manner inconsistent with the restrictions to which it is subject, and with notice of which the purchaser acquired it." In reference to Mr. *Collins'* argument, it makes no difference whether the case is that of the assignor or the assignee of the original lease. These cases, I think, shew the true test by which this question should be tried.

That disposes of the case except as to the 10th section of the *Conveyancing Act* of 1881, which if I am right in my view as to the enforcement of the negative covenant becomes comparatively immaterial. I have not looked very carefully into that section; but so far as I can ascertain the intention of the Legislature from the words of the section, and giving, as I consider myself bound to do, a reasonable and not a very restrictive construction to the section, I think that *Cain* is

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of the Plaintiff *Robert Cain*, his executors, administrators, or assigns, provided they or he should at the time deal in or vend such liquors, and should be willing to supply the same of good quality and at the fair current market price thereof; and from in any way committing a breach of the covenant in the lease of the 19th of November, 1886.

From this judgment the Defendant appealed. The appeal came on for hearing on the 7th of March, 1890.

Henn Collins, Q.C., *Mattinson*, and *McConkey*, for the Appellant:—

We contend that the covenant can only be taken advantage of by persons who are successors in the business of the lessors: *Doe* v. *Reid* (1), is very closely in point. The benefit of a covenant like this does not run to a mere assignee of the reversion in the demised property; *Vyvyan* v. *Arthur* (2) supports this view. In order to run with a mere assignment the covenant must be one which touches and concerns the land (*Mayor of Congleton* v. *Pattison* (3); *Spencer's Case* (4)); which this covenant does not.

The covenant is in fact open to two possible constructions, either of which is fatal to the Respondent. The first is, that, *Hands* is bound to take beer from the lessors and from a particular class of assigns described in the covenant, namely, any partners of the lessors. The parties have in this covenant themselves defined the full limit of the lessee's obligation, namely, that he is to take beer from the lessors, or either of them, *plus* any partner or partners of them or either of them; and this definition in the body of the covenant of a particular class of

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the person entitled to the receipt of the rent, and is the person entitled to the benefit of the covenant by the lessee; and if I did determine the question under the Act, I should say that *Cain* was fully within the purview and meaning of the 10th section, and that, as being the immediate reversioner, he is entitled to the benefit of the covenant whether the covenant does or does not run with the land, the old cases notwithstanding. That, however, is not so material as my general view is already given on the case. The result will be that my judgment is for the plaintiff, and the defendant must pay the costs of the action.

(1) 10 B. & C. 849.
(2) 1 B. & C. 410.
(3) 10 East, 130.
(4) 5 Rep. 16 b; 1 Sm. L. C. 9th Ed. 79.

assigns controls the previous general definition of the term "lessors" as including executors, administrators, and "assigns." The second construction is that, assuming the word "assigns" to bear its widest signification, the lessee's obligation was, at the most, to take beer from the lessors' assigns so long as a particular state of things continued—that is, so long as the trade of a brewer was carried on at the place where or in connection with which this covenant was entered into. In other words, the word "assigns" must be read as assigns of the particular business at the *Alton Brewery*, so that when that particular business was determined, as it has been, the covenant was gone; *Doe* v. *Reid* (1); *Taylor* v. *Caldwell* (2). If the covenant is dissevered from the business it cannot run with the land; and that is a proposition founded on common sense, otherwise a man who has contracted to take beer for his house from a particular brewer of established reputation, and has, as in the present instance, paid a large sum of money for that advantage, may find himself afterwards tied to a brewer whose reputation will not bring customers to his house. He might even find himself transferred to a person who, though selling beer, might not be himself a brewer at all. If it is held that a covenant such as this, when disconnected from the particular business, passes to the assignee of the reversion, that will be opposed to *dicta* of great authority, and will defeat what were the obvious intentions of the parties to the covenant. This, we say, is a personal covenant, the benefit of which cannot pass to an assignee.

Although there is no actual decision upon the point, we submit that our view of the covenant is in accordance with principle and authority. The covenant is merely collateral, and does not "touch or concern the thing demised," and therefore, according to the second resolution in *Spencer's Case* (3), cannot run with the land. It only affects the mode in which the lessee is to carry on his business; that is to say, it obliges him to deal only with one particular brewery. In *Mayor of Congleton* v. *Pattison* (4), it was decided that a covenant by a lessee of a mill not to employ particular persons to work in the mill did not run with the land,

(1) 10 B. & C. 849.
(2) 3 B. & S. 826, 839.
(3) 5 Rep. 16 b.
(4) 10 East, 130.

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but only affected the mode in which the lessee was to carry on his business, and that a covenant to run with the land must touch and concern the land. In the subsequent case of *Doe* v. *Reid* (1), Mr. Justice *Bayley*, who was also one of the judges in *Mayor of Congleton* v. *Pattison* (2), thought the two cases undistinguishable; and Justice *Littledale*, referring to *Vyvyan* v. *Arthur* (3), said that if in that case the mill had been removed to another place the covenant, which was to grind at the mill all corn grown on the demised premises, would not have applied. Again, in *Keppell* v. *Bailey* (4), Lord *Brougham* thought a covenant of this nature, being merely collateral, did not run with the land. There are many other authorities to the same effect: *Purfrey's Case* (5); *Sampson* v. *Easterby* (6); *Thomas* v. *Hayward* (7); *Hartley* v. *Pehall* (8); *Davidson's* Conveyancing (9). In *Lybbe* v. *Hart* (10), where a lessee covenanted not to sell the hay, straw, &c., grown on his farm without the consent of the landlord, Lord Justice *Baggallay* thought that was "a covenant which does not run with the land, so as to be in any way attached to the land, nor does it run with the crops, if I may use that expression."

[COTTON, L.J.:—The covenant there was that all the hay, straw, &c., grown on the land should be used on the land. That seems to me to most materially affect the land. There must, I think, have been some mistake on the part of the Lord Justice.

LOPES, L.J.:—With all respect I should think that was a covenant which did "touch or concern the land." If the law is as there stated, it is highly inconvenient.]

Although the 10th section of the *Conveyancing and Law of Property Act*, 1881, undoubtedly does give the benefit of covenants to persons who might not have it at law, and has extended the principle of the Statute of 32 Henry VIII., c. 34, yet

(1) 10 B. & C. 849.
(2) 10 East, 130.
(3) 1 B. & C. 410.
(4) 2 My. & K. 517, 538, 544, 545.
(5) Godb. 120; Moore, 243.
(6) 9 B. & C. 505, 516.
(7) Law Rep. 4 Ex. 311.
(8) 1 Peake's N. P. C. 178.
(9) 3rd Ed. vol. v. part 1, p. 136.
(10) 29 Ch. D. 8, 19.

a covenant upon which a lessee can be sued by the assignee of the reversion must be a covenant that is incident to the reversion and affecting the occupation of the land demised: that is to say, it must be a covenant touching and concerning the land.

The covenantees in the present case are no longer capable of carrying out or giving effect to the covenant on their part; consequently they cannot compel the covenantor to perform his part of it; nor can they put their assignee, *Cain*, in a better position than themselves. If this covenant is, as we submit it is, purely collateral, the assignment had no effect upon it: it did not enlarge any right. Accordingly, this being a mere personal covenant with Messrs. *Clegg & Wright*, neither of them is now in a position to sue, and therefore they cannot put their assignee in that position.

Cozens-Hardy, Q.C., and *Rutherford*, for the Respondents:—

The question is, what is the true construction of this covenant? We submit that the construction put upon it by the Vice-Chancellor is plainly right. There is no reference in the covenant or in any other part of the lease to any particular brewery. Messrs. *Clegg & Wright* are not even described as of the "*Alton Brewery*," but merely as of "*Toxteth Park*." The covenant is not limited to beer actually brewed by them. If they only sold beer, though not brewed by themselves, the covenant would still apply. Suppose they had given up the *Alton Brewery* and opened another brewery in the same street, could it have been contended that the covenant did not apply? The words "deal in or vend such liquors as aforesaid" mean deal or vend "anywhere," and would be satisfied by the lessors supplying the lessee with beer although they did not brew a barrel of it themselves, the only limitation of the covenant being that they must sell beer "of good quality and at the fair current market price." Under the instruments of the 8th of July and 2nd of October, 1889, the Respondent *Cain* is the "assign" of Messrs. *Clegg & Wright*, and as such fills four characters: first, he is the assign of the reversion of the lease; secondly, of the goodwill of the brewery business; thirdly, of the site of the brewery; and, fourthly, of the benefit of *Hands'* covenant. Therefore, the mere change of the site of the brewery does

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not affect the liability under the covenant. *Doe* v. *Reid* (1) has no application to the present case. There the lessors were described in the lease as of the *Star Brewery*, whereas here there is no such description of the lessors; and the covenant was limited to the lessors "or their successors in their late or present trade as brewers," and to beer "brewed for sale"; and the judgment proceeded on the ground of the limited nature of the covenant. Supposing the *Alton Brewery* had been burnt down, and the lessors had carried on business in an adjoining house, could it be said they had lost the benefit of this covenant?

We submit that there has been in law a breach of the covenant, and that *Cain*, as an assignee of the covenant, is entitled to an injunction to restrain the breach of it.

None of the authorities cited have much to do with the case.

[They also referred to *Tulk* v. *Moxhay* (2); *Thomas* v. *Hayward* (3); *Fleetwood* v. *Hull* (4); *Tatem* v. *Chaplin* (5); *Hooper* v. *Clark* (6); *Mayor of Congleton* v. *Pattison* (7); *Luker* v. *Dennis* (8); *Renals* v. *Cowlishaw* (9).]

Henn Collins, in reply:—

The mere fact that the Plaintiff *Cain* is an assign of the covenant does not entitle him to sue upon it: *Renals* v. *Cowlishaw*. The substance of the covenant must be looked at. Upon the context the "assign" contemplated must have been an assign who can brew.

It would be a very strong thing for a Court of Equity to hold that upon a covenant of this sort the covenantee who originally contracted to take his beer from a well-known firm of brewers was bound to take it from any assign whomsoever, even a shoemaker in *New York*.

[COTTON, L.J.:—You have got this public-house at a lower rent than you would have paid if it had not been a tied house.]

This is not, according to the contention, a tie to a brewery, but

(1) 10 B. & C. 849.
(2) 2 Ph. 774.
(3) Law Rep. 4 Ex. 311.
(4) 23 Q. B. D. 35.
(5) 2 H. Bl. 133.
(6) Law Rep. 2 Q. B. 200.
(7) 10 East, 130.
(8) 7 Ch. D. 227, 235.
(9) 9 Ch. D. 125; 11 Ch. D. 866.

a tie to a number of different persons. If this is a covenant running with the land, then *sadit quæstio*. But it is not. It is a purely collateral covenant governing the conduct of the persons for the time being in occupation of the premises. It is not a covenant within the doctrine of *Tulk* v. *Moxhay* (1), which only applies to negative covenants, because it is in substance an affirmative covenant that the lessee shall do his best to extend the business, and shall buy his beer in this way. The lessors have assigned the benefit of that covenant, and incapacitated themselves from performing their part of it. The covenant, it is said, is not connected with any particular brewery, but the covenantees were persons who not only made, but who also bought and sold beer, and the covenant must at all events be regarded as a covenant with persons who have the skill to select beer, and this shews that it must be a personal covenant.

[He also referred to *Austerberry* v. *Corporation of Oldham* (2), and *Robson & Sharpe* v. *Drummond* (3).]

COTTON, L.J.:—

This is a case involving several points; but it has been very fully and ably argued, and we think on the whole we had better give the judgment at which we have arrived at once.

The first question is, What is the true construction of the covenant as to the purchase of beer? And in my opinion, in the events that have happened, the covenant will prevent the Defendant from buying beer except in the terms of the contract, if it can be otherwise enforced against him. [His Lordship then stated the facts of the case, and continued:—] The covenant in this case is that the said lessee will not at any time during the continuance of the demise, directly or indirectly, buy, receive, sell, or dispose of, or permit to be bought, received, sold, or disposed of, in or about the demised premises, any ales or stout (other than best stout) other than such "as shall have been *bonâ fide* purchased of the said lessors, or from them, or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them." It is

(1) 2 Ph. 774. (2) 29 Ch. D. 750, 755.
(3) 2 B. & Ad. 303.

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said that these latter words shew that the covenant was not intended to extend to the assigns of *Clegg & Wright*, because part of the definition of the persons who are included in the expression "lessors" is repeated here in terms which exclude the full application of that definition. But I cannot think that that is so. The covenant, reading it by the light of the definition, was entered into with the lessors, *Clegg & Wright*, and each of them, and the heirs, executors, administrators, and assigns of them and each and every of them; and although it perhaps was not necessary to have added these words at the end of the covenant, I cannot think that that addition prevents the covenant from being a covenant with the assigns of those who were the grantors of this lease to the Defendants.

But then it is said, as I understand the argument, that it can only have been intended to include such assigns as carry on the business of brewers at the particular brewery which was assigned to *Cain*, and where the business of brewing is no longer carried on. The case of *Doe* v. *Reid* (1) was much relied upon for the purpose of that construction, but it was a case where the language was different, and in my opinion there is nothing here to shew such an intention. Then there is this clause: "Provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the lessee of good quality and at the fair current market price." Well, it was pointed out by one of us in the course of the argument, that there is some protection granted here to the publican by this provision that the beer shall be of good quality, and that it shall be supplied at the fair current market price.

That, in my opinion, shews clearly that it was not intended in this case to restrict the benefit of the covenant to the persons who carried on this brewery at this particular place, for it does not in any way refer to the beer which is to be provided, as being beer made by the landlords or their assigns. The words are, "provided they or he shall at such time deal in or vend such liquors." It shews that there was no intention whatever to stipulate that the persons entitled to the benefit of the covenant were to be persons who made beer. It was not provided that they should

(1) 10 B. & C. 819.

continue to make the beer they were selling; but it was provided that it should be of good quality and be supplied at the fair current market price, and that they should deal in and vend beer. Considerable light was to my mind thrown upon the true intention of the parties by what was put before us by Mr. *Collins* in his reply, that at the time the covenant was entered into these landlords not only made beer, but bought beer, and supplied those who were not bound by any restrictive covenants to take beer from them alone. That, I think, shews what they were intending to provide for, viz., not that they should only supply beer which they themselves made, but that they should go on doing what they were then doing, supply beer either by making it, or by buying it, so long as they were able to supply it of good quality and at the fair market price. Then there is the case of *Doe* v. *Reid* (1), to which I have already referred. Now cases, so far as they give us a rule of construction, are very useful; but it is very seldom, to my mind, that a case upon the construction of one particular document tells us much about the construction of another document, unless it lays down some principle to guide us. In *Doe* v. *Reid*, the Defendant *Reid*, in taking a lease of a public-house from *John Phillips & Samuel Miall*, covenanted to purchase and take of and from *Phillips & Miall*, their executors, administrators, or assigns, or their successors in their late or present trade as brewers, all the porter, ale, and twopenny or amber, or such of the said liquors as by them should be brewed for sale, as should be sold or disposed of on the premises. *Phillips & Miall* sold their business and trade premises to *Stanley & Cass*, who again assigned to *Calvert & Co.*, and these assignees shut up the old brewery and removed the plant, so that though they carried on the original lessors' brewing business, they did not carry it on at the place where the original lessors carried it on. The case turned almost entirely upon the construction of the covenant, and the words, "or their successors in their late or present trade as brewers," though not in terms limiting the assigns to assigns in that position, afforded in that case a rule of construction. The Court accordingly held, that what was meant was successors carrying on the same trade—not merely

(1) 10 B. & C. 849.

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carrying on the trade of brewers, but carrying on the trade which was carried on by *Phillips & Miall* at that particular brewery. Now this particular clause which governs the construction of the covenant in *Doe* v. *Reid* (1) does not occur in the present case, and its absence leads me to put a different construction and effect upon this covenant from that which was put by the Court in *Doe* v. *Reid* upon the different words occurring in that case. It cannot, in my opinion, be said here that this was a personal covenant with the particular landlords who granted the lease, or that it was impossible for the benefit of that covenant to be conveyed to anybody else who did not carry on their trade. It is not like entering into a contract with a particular painter to paint your picture. That is a contract made with him personally, and he must not hand it over to anybody else. In my opinion, this is not a contract which is incapable of being assigned.

Then it is said that this covenant does not run with the land. I think it does run with the land. That is my opinion; but there are other points on which this case may be decided independently of that question. It is a contract relating to the way in which the business at a particular house is to be carried on—therefore it is a contract relating to the public-house, just as much, in my opinion, as a contract as to the mode in which the cultivation of a particular bit of land is to be carried on relates to the land. It affects the value of the reversion, it affects the house, and in my opinion it is a contract running with the land. If that is so, that will enable the judgment to be supported, and will enable the present owner of the reversion in this case to sue.

But there is another ground on which I think the judgment may be supported. Here there has been a sale to the Plaintiff by the lessors of the goodwill of the business. The Plaintiff is therefore, independently of the question whether the covenant runs with the land, entitled to sue so far as by assignment the landlord who entered into this covenant could give him the right. That being so, the difficulty as to the title to sue which there was in the case *Renals* v. *Cowlishaw* (2), before Vice-Chancellor *Hall*, is got rid of. There is no doubt that there is here an actual assignment of the benefit of the covenant to *Cain*, even if

(1) 10 B. & C. 849. (2) 9 Ch. D. 125.

that benefit did not pass by the mere assignment to him of the reversion of this public-house. Then, in my opinion, as he is thus entitled to sue, the doctrine of *Tulk* v. *Moxhay* (1), properly applied, will enable him to enforce that right as against the Defendant—that is to say, considering that the Defendant obtained this public-house at a less rent, as we may assume he did, by reason of the covenant, we ought not, as against the person entitled to the benefit of that covenant, to allow him to deal with the public-house in a way inconsistent with the covenant by reason of which he got it at a lower rent. Therefore, in my opinion, on that ground, even if this covenant did not run with the land, the judgment of the Vice-Chancellor is right.

But then it is said that this Court has decided that the doctrine of *Tulk* v. *Moxhay* will not be extended beyond a restrictive covenant. Now, in *Tulk* v. *Moxhay* the covenant was not in its terms restrictive, but it implied that the piece of ground in question there was to be used only as an ornamental garden. That, again, implied that the purchaser was not to build on it, which was what he was about to do. In this case, even if the covenant was in form a contract to buy all beer from the Plaintiffs, that would involve a negative contract that he should not buy his beer from anybody else; and in my opinion this case does not come within the rule which we laid down in the case of *Haywood* v. *Brunswick Permanent Benefit Building Society* (2). In that case land had been granted in fee in consideration of a rent-charge and a covenant to build and repair buildings, and the Court refused to enforce the covenant, considering the doctrine of *Tulk* v. *Moxhay* not applicable to the case of a covenant which was not in its nature restrictive, and could only be enforced by making the owner of the land put his hand in his pocket. In my opinion, both on the ground that here the covenant did run with the land, and also on the ground that the doctrine of *Tulk* v. *Moxhay* does apply, I think the order of the Vice-Chancellor is right.

LINDLEY, L.J.:—

I agree with Mr. *Collins* in thinking that this case is one of very great importance both to brewers and tenants who take

(1) 2 Ph. 774. (2) 8 Q. B. D. 403.

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tied houses, because it certainly is rather a startling thing to anybody to be told that when you have agreed to buy beer of a particular brewer you may find yourself bound to take beer from somebody else. Whether you are or are not depends upon the agreement into which you have entered. The whole question here to my mind turns upon the true construction of this agreement, and the only difficulty that I think serious is to find out whether this agreement is or is not assignable—that is to say, whether the tenant here entered into a contract with certain persons relying upon their personal skill and reputation, and agreed to buy beer of them and them alone, or whether he did not enter into a very much wider contract, and agree to buy beer from them or anybody to whom they might assign their business or the public-house. The answer to the question whether this is a personal unassignable contract or not must be gathered from the instrument itself, having regard of course to the position of both parties.

The lease has been gone through, and I will refer to it very shortly. The lessors are described as brewers; there is no reference to any particular place of business or anything of that kind; and the lessee is described as a licensed victualler. Then there is an ordinary lease of a public house, and then, reading it shortly, there come covenants by the tenant that he will use and occupy the premises demised as and for and in a tavern or public house only, and will conduct the same so as not to forfeit his license, and will keep open the premises for the sale of the articles before mentioned, which I will call ale and beer. Then there is a covenant about not getting ale or beer from other people. Now, just let us see whether this lease does or does not contain any indication either one way or the other as to whether the benefit of this was capable of being assigned. The very first thing that one comes across is the interpretation clause saying that the term "lessors," which applies to the brewers, shall include "each of them and their and each and every of their heirs, executors, administrators, and assigns." Those words are never found in what are called personal contracts. If I were to enter into an engagement with an artist to paint my picture, I should not put those words in. If he died, I should not leave it with his

executors to finish what he had done. Such words are out of place altogether in a contract which is personal in that sense.

Now, when we come to the covenant which more particularly relates to this matter, we find that the lessee has agreed with his lessors, that he will not during the lease—I am again reading it shortly—sell or dispose of on the premises any ale or stout other than such as shall have been *bonâ fide* purchased of the said lessors, "or from them or either of them either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them." That clause lets in partners. The covenant on the true construction of the agreement does not exclude such persons as these. It is not that I will only take beer from *Clegg & Wright*, but it lets in the partners. Well, does it go further? It turns upon the construction of very few words. Mr. *Collins* says that by reason of the introduction into this clause of the words "from them or either of them," it is tolerably apparent that the definition was departed from. I thought at first sight that there was a great deal in favour of that construction; but when you come to see what the whole clause is, it appears to me that you cannot put that limited construction upon it, and that upon the true construction of it the word "lessors" is used there in the sense in which it occurs everywhere else.

That being the case, I think there can be no reasonable doubt that this contract is not a personal unassignable contract. The question then arises whether it has been assigned to Mr. *Cain*. It unquestionably has. If it is capable of being assigned it has been assigned. It has been assigned without any controversy in equity by the brewers to *Cain*, and, inasmuch as he and his assignors are both suing, I see no answer whatever to this action upon that ground.

It has also been said that it is assigned to Mr. *Cain* by virtue of his being an assignee of the reversion in the lease. That raises a technical question which, stated in legal language, amounts to this: whether the benefit of this covenant runs with the land. We have heard the authorities discussed by Mr. *Collins*, who has studied this branch of the law probably more carefully than anybody living, and he has not persuaded me, I

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confess, that this is a covenant which does not run with the land. I rather think it does. If you look at the authorities which he has cited, and look at them carefully, this does, in lawyers' language, so "touch and concern" the land demised as to run with it at Common Law. But whether that is so or not, the benefit of the contract has been assigned to Mr. *Cain*, and Mr. *Cain* is entitled to it.

Then comes a question as to whether this contract is one which can be enforced in equity, having regard to the doctrine relating to specific performance and injunctions. Mr. *Collins* has suggested that, although this covenant is negative in point of form, it is affirmative in substance, and that therefore an injunction ought not to be granted. But when you look at the whole of this case, you find that the covenant, which he suggests is affirmative, really involves a negative element in it. If you treat the covenant to keep open this place as a public-house and to sell beer there as an affirmative covenant, you cannot treat the covenant as to the buying of beer as merely an affirmative covenant to buy beer of the lessors. You must put in the words, "and the lessors exclusively." If you get that, you get a negative portion of the covenant which can be properly enforced consistently with the doctrine applicable to cases of this kind; and therefore, whether you regard it as an affirmative covenant with a negative element in it, or whether you regard it as split up, as it is here, into these two parts, partly affirmative and partly negative, that negative part can be properly enforced.

For these reasons it appears to me that the decision is right, and the appeal must be dismissed with costs.

LOPES, L.J.:—

The question in this case is on the construction of the covenant. In the definition clause the word "lessors" includes assigns. It is contended with regard to this particular covenant that the words, "from them or either of them, alone or jointly with any other person or persons, who may hereafter become a partner or partners with them or either of them," which follow the word "lessors" in the covenant, shew an intention to exclude the operation of the definition clause, and accordingly

that the covenant must be dealt with entirely apart from that clause. I cannot adopt that view. I am bound to say that at first I was somewhat taken with it, but on consideration I think it cannot be maintained. It appears to me that the words to which I have alluded, following the word "lessors," were introduced merely to cover the case of third parties becoming partners with the lessors or assigns—not only assigns of the brewery with which the covenantees were then concerned, but any assigns, provided only that they or he should at such time deal in or vend such liquors as aforesaid, and should be willing to supply the same to the said lessee of good quality and at a fair current price. The covenant, therefore, in my opinion, cannot be said to be a personal covenant.

But then a question is raised as to whether the benefit of this covenant runs with the reversion. It was contended by Mr. *Collins* that it did not run with the reversion, and that it was purely collateral. The benefit to run with the reversion must touch or concern the demised premises. Now, does this covenant touch or concern the demised premises? It relates to the mode of enjoyment of a public-house. The thing demised is a public-house, and the covenant compels the covenantee to buy the beer of the covenantor and his assigns.

In my opinion, it touches and concerns the demised premises; it affects the mode of enjoyment of the premises, and therefore it runs with the reversion.

I entirely agree with what has been said with regard to the application of the case of *Tulk* v. *Moxhay* (1), and I think this appeal should be dismissed.

Solicitors: *J. Hands*, for *Bartlett & Berry, Liverpool; Field, Roscoe & Co.*, for *Miller, Peel, Hughes & Co., Liverpool.*

(1) 2 Ph. 774.

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[1888 F. 962.]

Mortgage—Solicitor-Mortgagee—Costs—Charge—Future Costs—Profit Costs—Contract—"Clogging the Redemption."

A deed of mortgage and further charge contained a recital that the mortgagees, who were a solicitor and an auctioneer, had taken transfers of certain mortgage debts at the request of the mortgagors, and on the terms that they should advance the money therefor, and "should be entitled to make the same charges and receive the same remuneration respectively for all business done by them respectively in and about these presents as they would have been entitled to make and receive if they had not been mortgagees." And the mortgagors covenanted to pay the existing mortgage debts, together with a further advance, and also "every other sum which may hereafter be advanced or paid by the mortgagees, or either of them, to or become owing to them or him by the mortgagors, or either of them;" and the mortgagors charged the mortgaged property with the aggregate of the mortgage debts and further advance, and with any other sum as aforesaid. The mortgage money was advanced by the mortgagees as trustees, and prior to the mortgage, which was prepared by the solicitor-mortgagee, a valuation of the property was made by the auctioneer-mortgagee on the instructions of the solicitor. The mortgagees afterwards entered into possession.

Held (affirming the decision of *Kay*, J.), that in taking the mortgagees' accounts in a foreclosure action the following charges ought to be disallowed—(1) for the costs of an order, made subsequent to the mortgage, appointing trustees under the *Settled Land Act*, 1882, for the purpose of leasing part of the mortgaged property; (2) for costs incurred by one of the mortgagors to the solicitor-mortgagee, as her solicitor, subsequently to the mortgage and in matters unconnected with it; and (3) a fee paid by the solicitor-mortgagee to the auctioneer-mortgagee for his valuation; the Court holding that the recital and covenant, read together, did not cover any of these charges.

Per *Kay*, J.:—As a mortgagee cannot charge his mortgagor with more than his principal, interest and costs, he is not entitled to charge the mortgagor with any sum payable for his, the mortgagee's, own benefit, such as professional or profit costs for the preparation of the mortgage deed, if he is a solicitor, or for the valuation of the property for the purpose of the mortgage, if he is a surveyor: nor, on the principle that a mortgagee cannot clog the equity of redemption with any by-agreement, can he contract with the mortgagor for any such payment.

ADJOURNED SUMMONS.

By an indenture of mortgage and further charge made on the

11th of September, 1885, between *Mary Ann Hopkins*, widow, and *Elizabeth Andrews*, widow (thereinafter called "the mortgagors"), of the one part and *John Mack Leeder*, "auctioneer," and *Henry Harrison Field*, "solicitor" (thereinafter called "the mortgagees"), being a deed supplemental to two mortgages and the transfers thereof to the present mortgagees: after reciting that "whereas the mortgagees took over both transfers of the said mortgages at the request of the mortgagors, and on the terms that they should advance the money necessary therefor at the rate of £4 10*s.* per cent. per annum, to be paid quarterly, and that on the other hand they should be entitled to make the same charges and to receive the same remuneration respectively for all business done by them respectively in or about these presents as they would have been entitled to make and receive if they had not been mortgagees:" And also reciting the amounts of the mortgage debts, and that it was part of the arrangement between the parties that the mortgagees should lend to the mortgagors the further sum of £282 15*s.* 9*d.*: It was witnessed that in consideration of £1017 4*s.* 3*d.*, being part of the mortgage debts then owing to the mortgagees, and of the further advance of £282 15*s.* 9*d.* by the mortgagees out of moneys belonging to them on a joint account, the mortgagors did, and as a separate covenant each of them did, thereby covenant for payment of the £1017 4*s.* 3*d.* and £282 15*s.* 9*d.*, making together £1300, with interest at £4 10*s.* per cent., and that they or one of them would, on such of the quarterly days therein mentioned as should happen next after the same respectively should be advanced or paid or become owing, pay to the mortgagees "every other sum which may hereafter be advanced or paid by the mortgagees, or either of them, to or become owing to them or him by the mortgagors, or either of them," with interest from the time "of the same respectively being advanced or paid or becoming owing." And it was also witnessed that the mortgagors thereby charged the mortgaged hereditaments with the payment to the mortgagees of the said principal sum of £1300 and interest, and of "any other sum which may hereafter be advanced or paid or become owing as aforesaid, and the interest thereon."

The deed bore a stamp covering £100 beyond the amount

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actually advanced. The transfers and further charge were prepared by *Field*, who had been consulted by Mrs. *Andrews* and Mrs. *Hopkins* upon the subject of the loan intended to be covered by them.

The money secured by the transfers and further charge was advanced by Messrs. *Leeder & Field* out of a fund of which they were trustees for a lady, on whose behalf, and for the purpose of the intended investment, a valuation was made by *Leeder* upon *Field's* instructions, *Leeder* being a land valuer as well as an auctioneer.

Mrs. *Andrews*, one of the mortgagors, was, under the will of her deceased husband, *John Andrews*, tenant for life of the mortgaged property, and was also, under the will of her deceased son, entitled absolutely to his share in reversion on her death. Mrs. *Hopkins*, the other mortgagor, was a daughter of Mrs. *Andrews*, and, under the will of *John Andrews*, was entitled to a share of the mortgaged property in reversion on the death of her mother.

Mrs. *Andrews* died on the 2nd of January, 1888, and Mrs. *Hopkins* on the 17th of February, 1888.

Leeder having ceased to have any interest in the mortgage securities, they became vested in *Field* and one *Tucker*, who proceeded to receive the rents of the mortgaged property as mortgagees in possession.

On the 18th of June, 1888, Messrs. *Field* and *Tucker* issued an originating summons against the parties interested in the equity of redemption for an account and foreclosure, and on the 3rd of December, 1888, the usual order for accounts was made in Chambers.

The Plaintiffs having carried in their accounts under the order, the Chief Clerk by his certificate disallowed the following items: (1.) A sum of £13 6*s.* 1*d.* charged by the mortgagees as the costs (including costs out of pocket) of an application by Mrs. *Hopkins* in 1887, to which Mrs. *Andrews* was made a respondent for the appointment of trustees of the will of *John Andrews* for the purposes of the *Settled Land Act*, 1882, *Field* having acted as the Applicant's solicitor in the matter; (2.) A sum of £17 3*s.* 5*d.*, charged for costs incurred by Mrs. *Andrews* to the Plaintiff *Field*, as her solicitor, but in respect of matters subsequent to and un-

connected with the transfers and further charge; and (3.) a fee of £5 5*s.*, paid by *Field* to *Leeder*, the mortgagee-auctioneer, for his report on and valuation of the mortgaged property.

This was a summons by the Plaintiffs to vary the Chief Clerk's certificate by allowing the three items above mentioned. The summons was heard before Mr. Justice *Kay* on the 14th of January, 1890.

Renshaw, Q.C., and *G. Williamson*, for the Plaintiffs:—

We submit that these items should be allowed. They are covered by the recital and the covenant, which amount to a contract within the *Attorneys and Solicitors Act*, 1870 (33 & 34 Vict. c. 28) s. 16. We admit that, but for that contract, we could not have charged the first two items. As to the third item, the valuation was made for the purpose of the proposed mortgage, and before the relation of mortgagor and mortgagee existed. It was a necessary expense, as the intending mortgagees were trustees, and therefore bound to have the property valued.

[They referred to *In re Roberts* (1); *Cradock* v. *Piper* (2), and *Mainland* v. *Upjohn* (3).]

Ashton Cross, for the Defendants:—

These items being profit costs, are such as cannot be charged by a mortgagee against a mortgagor, either under contract or independently of contract, for a mortgagor is not liable for more than his principal, interest and costs. Accordingly these items are not covered by the recital and covenant, which really apply only to future advances.

[He referred to *Gregg* v. *Slater* (4).]

Renshaw, in reply.

[KAY, J., referred to *Broughton* v. *Broughton* (5) and *James* v. *Kerr* (6).]

KAY, J.:—

Although the amount involved in this contention is not large, the principle appears to me to be very important.

(1) 43 Ch. D. 52.
(2) 1 Mac. & G. 664.
(3) 41 Ch. D. 126.
(4) 25 L. J. (Ch.) 440.
(5) 5 D. M. & G. 160.
(6) 40 Ch. D. 449.

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A mortgage is made to two persons who, in fact, are trustees for a lady for whom they advanced the money. As stated on the face of the mortgage, one of the mortgagees was an auctioneer and the other was a solicitor. The mortgage is in this form. It contains this recital:—"Whereas the mortgagees took over both transfers of the said mortgages at the request of the mortgagors—" [His Lordship read the rest of the recital as above stated and continued:—] Then, following on that recital, there is a covenant by the mortgagors to pay to the mortgagees part of the principal mortgage debts which had been transferred to them, and also the further advance—which is stated to be advanced by the mortgagees out of moneys belonging to them on a joint account—with interest at £4 10*s.* per cent., and also to pay to the mortgagees "every other sum which may hereafter be advanced or paid by the mortgagees, or either of them, to or become owing to them or him by the mortgagors, or either of them," with interest.

Now the question—and it is a very important question—is, What is the meaning, or rather the construction, of this deed? Let us try it in this way.

One of the mortgagees was, as I have said, a solicitor. The other mortgagee was an auctioneer, who has since ceased to have any interest in the matter either as mortgagee or otherwise. This solicitor claims, in this foreclosure action, to be allowed in his accounts costs incurred by one of the mortgagors, who was tenant for life of the mortgaged property, in matters which have nothing to do with this mortgage at all, and which were incurred subsequently to the mortgage, his claim being that they are "owing to him" within the meaning of the covenant. The law used to be that a mortgagee-solicitor could not take a security for future costs at all, but that has been altered by the *Attorneys and Solicitors Act*, 1870 (33 & 34 Vict. c. 28), s. 16, and he now may do so; but if he means to do so he should make it very clear that he does mean to do so.

The only words here under which the solicitor can charge what he now claims are, "Every other sum which may hereafter be advanced or paid by the mortgagees, or either of them, to or become owing to them or him by the mortgagors, or either of them." It is said that included future costs incurred by one of

these mortgagors to one of the mortgagees, who happens to be a solicitor. I should be very reluctant to come to that conclusion in the absence of authority. Where a solicitor means that his mortgage security shall cover future costs, he is bound to say so, and none the less where he is the person who prepares the mortgage. I do not read these words as having any such meaning as the solicitor contends. The real object of the covenant was to secure future advances. The covenant was put in probably on account of the recital. The recital was that it was intended that the mortgagees might recover from the mortgagors the same charges and the same remuneration for all business done "in and about these presents" as the mortgagees would have been entitled to if they had not been mortgagees. By "in and about these presents" is meant not the "property" but "this deed." In my opinion the meaning of this covenant was that it included, and was intended to include, beside future advances, any charge of this kind which the mortgagees were entitled, under the contract mentioned in the recital, to charge against the mortgagors. The covenant, taken by itself, is certainly ambiguous, and we are entitled to look at the recital to see what is meant: and reading the two together I take the covenant to have only the meaning I have stated.

Accordingly it appears to me that the Chief Clerk was right in disallowing, under this covenant, these costs which were incurred by one of the mortgagors to one of the mortgagees, and which had nothing to do with this mortgage in any way. That disposes of the claims 1 and 2.

Then another claim is this: An item of five guineas is claimed by the solicitor-mortgagee as having been paid by him to his co-mortgagee, the auctioneer. He says it was for a valuation made on behalf of a lady, their *cestui que trust*, prior to and for the purpose of this mortgage, and that it comes within the recital. That raises this important question: Can a mortgagee stipulate for more than his principal, interest, and costs by a recital of this kind, it being clear that this remuneration would not have been payable but for this recital? It is said by Lord *Romilly* in *Gregg* v. *Slater* (1), and by myself in the recent case of *In re*

(1) 25 L. J. (Ch.) 440.

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Roberts (1), that where a solicitor-mortgagee tries to charge against his mortgagor professional costs in connection with the preparation of the mortgage, such a charge has been disallowed, because he is not claiming costs paid to another person, but he is claiming them for himself, and, as the mortgagor is only liable to pay outgoings, he is not bound to pay anything charged by the solicitor for his own benefit. Therefore, this sum charged by the auctioneer as incidental to the preparation of this mortgage is not a proper charge, unless it is covered by the recital I have read. Then comes the question, Can a mortgagee contract for payment to himself of a profit-payment to which, but for such a contract, he would not be entitled? The matter has been considered in many cases. It is only necessary for me to refer to my own judgment in *James* v. *Kerr* (2), where I quote the language of the Master of the Rolls in *Jennings* v. *Ward* (3), that "a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." That decision has since been followed in a great many cases: and I go on in my judgment to state that "in *Broad* v. *Selfe* (4) Lord *Romilly* decided that this rule was not affected by the repeal of the usury laws, and he disallowed a commission for which the mortgagee had stipulated in addition to his principal and interest." Until those decisions are reversed I shall feel bound to follow them. Accordingly, the five guineas taken by the auctioneer-mortgagee, which he could not possibly have claimed without a special contract, could not be the subject of a valid contract. According to the mortgage law recognised in this country, a mortgagee cannot make such a contract: he cannot contract to get anything from the estate beyond his principal, interest, and costs: therefore profit-charges which he is not entitled to be paid stand on the same footing as commission, which he clearly cannot charge. Accordingly the Chief Clerk was quite right on this point also.

I dismiss the summons, with costs.

G. I. F. C.

C. A.

From this judgment the Plaintiffs appealed. The appeal was heard on the 18th of March, 1890.

(1) 43 Ch. D. 52.
(2) 40 Ch. D. 459.
(3) 2 Vern. 520.
(4) 11 W. R. 1036.

Abel Thomas, for the Appellants, referred to *Dawes* v. *Tredwell* (1).

Ashton Cross (*Cozens-Hardy*, Q.C., with him), for the Respondents.

Abel Thomas, in reply.

COTTON, L.J.:—

The first point in dispute on this appeal relates to a small sum of five guineas paid by the solicitor-mortgagee to the other mortgagee, who was an auctioneer, for valuing the property for the purpose of ascertaining whether it was a sufficient security for the trust money, and he seeks to charge this sum against the mortgagors. It is not suggested that there was any special bargain as to the payment between the mortgagees and the mortgagors; but it is said that no persons would lend any money without such a valuation, and therefore that the cost is properly charged against the mortgagors. It may happen in some cases that there is a bargain between a mortgagee and a mortgagor that certain extra expenses shall be within the mortgage security; but here there was no such bargain at all; and I think, therefore, that this charge was properly disallowed by the Chief Clerk and by the Judge.

The next claim is for the amount of a bill of costs due from one of the mortgagors to the solicitor-mortgagee for costs incurred subsequently to the date of the mortgage for business not connected with the mortgage. Does the mortgage deed cover that claim? In my opinion, although the words of the deed are not very clear, it is not included in the covenant. We must look at the recitals as well as the covenant. First there is a recital that the mortgagees took over both transfers of the mortgages at the request of the mortgagors "on the terms that they should advance the money necessary therefor at the rate of £4 10*s.* per cent. per annum, to be paid quarterly, and that on the other hand they should be entitled to make the same charges and to receive the same remuneration respectively for all business done by them

(1) 18 Ch. D. 354.

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respectively in or about these presents as they would have been entitled to make and receive if they had not been mortgagees." Then there is a covenant by the mortgagors that they would pay to the mortgagees the two sums of £1017 4*s.* 3*d.* and £282 15*s.* 9*d.*, making together £1300, with interest at £4 10*s.* per cent., and would on such of the quarterly days as therein mentioned as should happen next after the same respectively should be advanced or paid or become owing, pay to the mortgagees "every other sum which may hereafter be advanced or paid by the mortgagees, or either of them, to or become owing to them or him, by the mortgagors or either of them" with interest. And the mortgagors charged the mortgaged premises with "any sums which may hereafter be advanced or paid or become due as aforesaid." This is relied on by the Appellants as shewing that the costs incurred by the mortgagees for business done for the mortgagors should be brought into the mortgage account and be added to the security. I do not think so. If it was intended that the cost of business done by the mortgagees as auctioneer and solicitor should be added to the mortgage debt, there would have been something more than this—there would have been special words providing that the costs should be added to the debt due on the mortgage. Again, it is to be noticed that interest is to be paid on the sums to be subsequently advanced by the mortgagees from the time when they are advanced and become owing. That could not have been intended to apply to costs incurred for professional business. In my opinion, these words only apply to sums advanced or paid by the mortgagees or one of them which in strictness did not come within the mortgage debt, yet were in substance advanced by the mortgagees. Nor can we hold these costs to come under the ordinary mortgagee's costs. They were incurred by one of the mortgagors only, and in business not connected with the mortgage. The appeal, in my opinion, entirely fails.

LINDLEY, L.J.:—

I am of the same opinion. The main question turns on the construction of the mortgage deed, especially on the rather strange words, "every other sum which may hereafter be ad-

vanced or paid by the mortgagees, or either of them, to or become owing to them or him by the mortgagors or either of them." I read the words "become owing" in this sense, due by way of payment or advance by the mortgagees to the mortgagors—as, for instance, by allowing them to overdraw their rent account; but I cannot construe them as meaning any conceivable indebtedness from either mortgagor to either mortgagee. I am satisfied this was never intended. Such a construction would be unreasonable, unless there were some unambiguous words to shew that such was the meaning of the parties.

This view of the construction gets rid both of the claim to the bills of costs and to the claim for the auctioneer's fee. The appeal must therefore be dismissed.

LOPES, L.J. :—

I entirely agree. The principal thing we have to look at is the covenant in the mortgage deed. It is contended that future costs due from any of the mortgagors to any of the mortgagees are included in the covenant to pay any sum thereafter to become owing to the mortgagees or either of them by the mortgagors or either of them. I am satisfied that the true meaning of these words was that they were intended to cover future advances to the mortgagors, not any general indebtedness of any of the mortgagors to any of the mortgagees. The appeal entirely fails.

Solicitors: *Williamson, Hill & Co.*, for *J. H. Field, Cardiff*; *R. White*, for *J. A. Thomas, Swansea.*

M. W.

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Jan. 13.
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March 18, 20, 21, 22; *April* 1.

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Limited Company—Mortgage—Ultra Vires—Future Calls—Unpaid Capital—Winding-up—Shareholder—Mortgagees—Set-off—Creditors—Priority—Pari Passu—"Calls"—"Assets"—"Capital"—Companies Clauses Consolidation Act, 1845, *s.* 38 [*Revised Ed. Statutes, vol. ix., p.* 571]—*Companies Act*, 1862, *ss.* 7, 8 *sub-s.* 5, 9 *sub-s.* 4, 12, 14, 16, 26, 38, 75, 94, 95, 98, 101, 102, 138 [*Revised Ed. Statutes, vol. xiv., pp.* 203–206, 208, 211, 219, 223–225, 231]—*Companies Act*, 1867, *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628]—*Companies Act*, 1879, *s.* 5.

The memorandum of association of a limited company stated one of its objects to be "to borrow money by mortgage or otherwise, and issue mortgage debentures or any other securities founded or based upon all or any of the real and personal assets." By the articles the directors were empowered to "borrow on mortgage of all or any part of the property of the company," and to include in any such mortgage "all or any definite proportion of the capital of the company then uncalled."

In 1882 the company, to secure an advance, mortgaged "the uncalled amounts" of £4 per share on certain shares partly called up, and "all the personal property, assets, and effects which now or at any future time during the continuance of this security shall belong to the company."

In 1886 and 1887 the company executed further mortgages of "the said uncalled amounts" of £4 per share to other persons, some of whom were themselves shareholders.

In 1889 a compulsory order was made for winding up the company, the £4 per share being then still uncalled. The question then arose whether the several mortgagees were entitled to have the calls to be made by the liquidator in the winding-up applied in payment of their mortgage debts in priority to the unsecured creditors:—

Held, by the Court of Appeal (affirming *Stirling*, J., *Lopes*, L.J., *dubitante*), that the calls to be made by the liquidator in the winding-up, including the calls on the shares of such of the mortgagees as were shareholders, were bound by the mortgages, and that the several mortgagees were entitled to have the calls applied in payment of their mortgage debts in priority to the general creditors.

Per Cotton and *Lindley*, L.JJ.:—There is nothing in the *Companies Act*, 1862, or the subsequent amending Acts, expressly or by necessary implication prohibiting a limited company from mortgaging its unpaid-up capital; consequently, where power to mortgage future or unpaid-up capital is given by the memorandum or articles of association, a mortgage by the company of its future or uncalled capital is valid, even as against

creditors in a winding-up, the calls in a winding-up being part of the "assets" or "capital" of the company.

In re Phœnix Bessemer Steel Company (1), and *Howard* v. *Patent Ivory Manufacturing Company* (2), followed.

THE *Pyle Works, Limited*, were registered in 1880, under the *Companies Acts*, 1862 and 1867, for the purpose, amongst other things, of taking over and working certain ironworks in *Glamorganshire*, the nominal capital of the company being £100,000, in 10,000 shares of £10 each, of which 5000 were to be preferred and 5000 were to be deferred shares. One of the objects of the company, as stated in the memorandum, was "to borrow money by mortgage or otherwise, receive money on deposit, and issue transferable and other bonds and mortgage debentures, and any other securities founded or based upon all or any of the real and personal assets or on the credit of the company."

The articles of association provided (art. 3) that the business of the company should include the several objects expressed in the memorandum, and they also authorized the directors, with the sanction of a resolution of the company, to increase the capital of the company by the creation of new shares; and further powers were given to the directors as follows:—

Art. 106. "They may let, mortgage, sell, or otherwise dispose of, either absolutely or conditionally, and in such manner and upon such terms and conditions in all respects as they think fit, any of the property of the company, and may accept payment or satisfaction for any property so disposed of in fully-paid-up or other shares, or partly in shares of the company or any other company, and partly in cash, or in any such other manner whatsoever as they deem expedient."

Art. 111. "They may from time to time borrow on bonds or debentures of the company, or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sums of money as they from time to time think expedient."

On the 3rd of January, 1882, the company executed to *Frederic*

(1) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854. (2) 38 Ch. D. 156.

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Greenwood and *John Brooke Greenwood* a mortgage to secure the repayment of £2500 and interest at 6 per cent. per annum, the property thereby assigned as security for this repayment being: "1. All the uncalled amounts, equal to £4 per share, on 3500 preferred shares issued up to this date out of a total of 4027 preference shares allotted, the difference between 3500 shares and 4027 shares having been fully paid upon. 2. All the personal property, assets, and effects which now or at any future time during the continuance of this security shall belong to the company, and all interest of the company therein, but not including any uncalled capital of the company, except as herein expressly mentioned."

Frederic Greenwood was a shareholder in the company, but not *John Brooke Greenwood.*

At a meeting of the directors of the company, held on the 19th of April, 1886, a resolution was passed that a charge on the uncalled capital should be given to *Robert McIlwraith* and *Edward Gotto* in respect of a loan to the Company of £5000 from the *British Linen Company's Bank,* and for the repayment of which loan those gentlemen had given a guarantee to the bank; and that a similar charge to the extent of £1500 should be given to those gentlemen to cover a guarantee they had given to the *Great Western* and *London and North Western Railway Companies* for the payment of expenses for carriage of goods upon the ledger accounts of those companies; and the company's solicitors were instructed to prepare charges in favour of Messrs. *McIlwraith & Gotto* accordingly.

McIlwraith was a shareholder in the company and chairman of the board of directors, and *Gotto* was also a shareholder and director. Neither of them were present at the meeting of the 19th of April, 1886, but both were present at a subsequent meeting of the board on the 9th of June, 1886, at which the minutes of the previous meeting were read and confirmed.

On the 3rd of May, 1886—that is, between the dates of the two meetings—the above resolution was carried into effect by a mortgage of that date to *McIlwraith* and *Gotto,* which was expressed to be by way of security against any loss or damage the mortgagees might sustain by reason of their having guaranteed to the *British*

Linen Company's Bank the repayment of a sum of £5000 advanced by the bank to the company with interest at 4 per cent. per annum, and of their also having guaranteed to the *London and North Western Railway Company* and to the *Great Western Railway Company* the payment of such sum as might be due to those companies by the company, for carriage of goods upon their ledger account with the railway companies; the property assigned to the mortgagees as security being "all the uncalled-up amounts of £4 per share on 5000 shares" (which included ordinary and preference shares) on which £6 per share only had been paid up. This mortgage was also expressed to be "subject to" the above-mentioned mortgage to Messrs. *Greenwood.* Under their guarantee *McIlwraith* and *Gotto* paid the £5000 to the *British Linen Company's Bank,* and also made large payments to the two railway companies amounting to a further sum of £1943, the total amount due to those gentlemen under their several guarantees being £6943.

On the 10th of August, 1887, the company executed a mortgage to *Ferdinand Gautier* (who was not a shareholder) to secure the repayment of £4000 with interest at 8 per cent. per annum, the property assigned as security being "all the said uncalled-up amounts of £4 per share on the said 5000 shares," but subject to the said mortgages to Messrs. *Greenwood* and to Messrs. *McIlwraith* and *Gotto.*

On the 28th of October, 1887, the company executed a mortgage to *McIlwraith* alone to secure the repayment of £3000 with interest at 4 per cent. per annum, the property assigned as security being "all the said uncalled-up amounts of £4 per share on the said 5000 shares." This mortgage was expressed to be "subject to" the mortgages to Messrs. *Greenwood* and to Messrs. *McIlwraith* and *Gotto;* but it did not any way refer to *Gautier's* mortgage. It appeared, however, that *McIlwraith* had waived any claim to priority over *Gautier's* mortgage.

Of the four above-mentioned mortgages *Gautier's* was the only one a copy of which had been filed or registered at the office of the Registrar of Joint Stock Companies, though all were registered in the register of mortgages kept by the company.

On the 16th of February, 1889, the usual compulsory order

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was made for winding up the company, and subsequently *F. Greenwood* was settled on the list of contributories for 100 shares, *McIlwraith* for 583 shares, and *Gotto* for 300 shares, £4 per share being at the date of the liquidation uncalled in respect of each of such several shares. £4 per share also remained uncalled in respect of shares held by other contributories.

At the date of the winding-up order considerable sums remained due to the several mortgagees under the four mortgages above mentioned, and the question then arose whether by virtue of those mortgages of uncalled capital the mortgagees were entitled to have the calls to be made in the winding-up applied in payment of their mortgage debts in priority to the unsecured creditors of the company.

This question was raised by three summonses.

The first was by *Gautier*, asking that the official liquidator might be directed to give effect to his mortgage security, and for that purpose to make and enforce all necessary calls on the contributories.

The second summons was by *Gotto*, asking that an account might be taken of what was due for principal, interest, and costs on the mortgage to *McIlwraith* and himself; that the liquidator might be directed to give effect to the mortgage, and for that purpose to make and enforce all necessary calls on the contributories; and that all moneys received in respect of such calls might be applied in payment of the amount found due on such mortgage

In an affidavit in opposition to this summons the liquidator submitted that the mortgage to *McIlwraith & Gotto* should stand for £6500 only, that being the sole extent of the charge authorized by the resolution of the 19th of April, 1886.

The third summons was by the Messrs. *Greenwood* and by *McIlwraith*, asking that it might be declared that the Applicants respectively were, under the mortgages of the 3rd of January, 1882, and the 28th of October, 1887, entitled to good and valid charges over the uncalled capital of the company comprised therein: that an account might be taken of what was due on such mortgages: that, if necessary, an inquiry might be directed as to the priorities of persons claiming to have charges over such un-

called capital; that the liquidator might be directed to give effect to and satisfy such mortgages, and for that purpose to enforce and recover payment of the uncalled capital then remaining unpaid, and out of the moneys to be received by him in respect of the said uncalled capital to pay and satisfy—and, if necessary, according to their respective priorities—the amounts which might be found due for principal, interest, and costs under such mortgages.

The several summonses now came on for argument.

Hastings, Q.C., and *Whinney*, in support of the first and third summonses—that is, *Gautier's* and the Messrs. *Greenwood's* and *McIlwraith's*:—

It is perfectly competent for a company to take by apt words in the instrument by which it is constituted power to mortgage its uncalled capital. In this case one of the objects of the company, as defined by the memorandum of association, is "to borrow money . . and issue . . . securities founded or based upon all or any of the real and personal assets or on the credit of the company." This in effect empowers the company to mortgage uncalled capital and would be enough for our purpose; but ambiguity, if any, in a memorandum of association may be explained by the articles; and all ambiguity is taken away by art. 111, which in express terms empowers the directors to borrow on mortgage of any of the property of the company "either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled." This company, having thus the power, has exercised it in our favour; and the case of *In re Phœnix Bessemer Steel Company* (1) is a direct authority that such a mortgage is good, and that its validity is not affected by the subsequent winding-up of the company. Other authorities in our favour are *Howard* v. *Patent Ivory Manufacturing Company* (2), and *Stanley's Case* (3).

In *Bank of South Australia* v. *Abrahams* (4) there was no express power to mortgage future calls; but *Stanley's Case* was

(1) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(2) 38 Ch. D. 156.
(3) 4 D. J. & S. 407.
(4) Law Rep. 6 P. C. 265.

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referred to with approval as having authoritatively settled the law.

Buckley, Q.C., and *Ashworth James*, in support of the second summons—namely, *Gotto's*:—

We concede that we cannot hold our security beyond £6500; but as to the rest of the debt, we can come in as ordinary creditors. Upon the first point, *i.e.*, the question of the validity of the security, we adopt the arguments which were used in support of the first and third summonses. But upon this summons the further question arises whether *McIlwraith* and *Gotto*, being shareholders in the company, can legally take a security upon uncalled capital payable by themselves; and we contend that they can. There is no authority to the contrary.

In *Grissell's Case* (1) it was held that in the winding-up of a company a person who is both creditor and contributory cannot set off the debt due to him against the calls made upon his shares; and *Black & Co.'s Case* (2) established that a company cannot contract that a contributory shall have a right of set-off against the calls upon his shares. But those were both cases of set-off—and this is not a case of set-off at all. It is a question of property, and those authorities have no application. Here the calls which have been mortgaged are the property of the mortgagee. The company only owns the equity of redemption in the calls, and the mortgagee is entitled to say, "Give me my own money." Then, if a mortgage of uncalled capital is good, it is immaterial from whom the calls come. As a matter of fact, however, we have paid ours, and we merely ask for what the company owes us.

Giffard, Q.C., and *Haldane*, for the official liquidator:—

The principle of the decisions in *In re Phœnix Bessemer Steel Company* (3), and in *Howard* v. *Patent Ivory Manufacturing Company* (4), is that, if the words of the memorandum and articles of association are large enough to confer the power to mortgage

(1) Law Rep. 1 Ch. 528.
(2) Ibid. 8 Ch. 254.
(3) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(4) 38 Ch. D. 156.

uncalled capital, the company may do so, and if the charges here in question are valid the liquidator is ready to pay them.

Beale, Q.C., and *T. H. Carson*, for Messrs. *Swan & McQueen*, parties representing unsecured creditors to the amount of £20,000:—

In the decided cases no distinction has hitherto been drawn between the liability to pay calls to a company and the liability to contribute to the assets of a company in process of being wound up, and the real point now in issue has never before been decided or raised. The liability to pay calls to a company is a liability by contract; the liability to pay in the winding-up is a liability by statute measured by the amount remaining uncalled up upon the shares: *Lindley* on Companies (1).

[STIRLING, J.:—Is not the power a power to charge whatever is coming on the shares, whether in the winding-up or not? Why does the liquidator stand in a better position than the company?]

The liquidator is the enforcer of rights of execution—rights which cannot be sold. The contributions enforceable in a winding-up are the statutory substitute for the direct right of creditors to proceed by execution against shareholders. The company here has purported to confer on the directors the power to borrow on mortgage of its uncalled capital. But that which comes to the liquidator, and which this company has no power to control, cannot be described as "uncalled capital." Uncalled capital is something which belongs to the company as a going concern. A charge by the directors of the company cannot affect that which does not and never could belong to the company. The statute makes the difference. It imposes the obligation of contributing to the assets of the company an amount equal to "the uncalled amount," and enacts that that contribution shall be dealt with as the Act directs—*i.e.*, *pari passu* among all the creditors. The 16th section of the *Companies Act*, 1862, which contains enactments as to the effect of the articles of association of a company and as to the nature of the debt when moneys are payable by any member to the

(4) 5th Ed. p. 384.

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company, does not impose any liability upon a member in the event of a winding-up, nor would there be any such liability, but for sect. 38 of that Act, which imposes a new liability different from that which attaches when the company is a going concern.

[STIRLING, J., referred to *Robinson's Executors' Case* (1), where it was held that a call made upon a contributory of a company which was being wound up under the *Joint Stock Companies Winding-up Acts* was not a specialty debt.]

Sect. 16 was inserted in order to get over the difficulties which occasioned so much trouble in that case: *Buck* v. *Robson* (2). The liability to contribute imposed by sect. 38 is, under sect. 75, to be deemed a specialty debt accruing from the member "at the time when his liability commenced." Then sect. 98 empowers the Court, as soon as may be after the commencement of the winding-up, to settle the list of contributories, and to cause the assets of the company to be collected and applied in discharge of its liabilities; while sect. 133, providing that in the voluntary winding-up of a company its liabilities are to be satisfied *pari passu*, shews the intention of the Legislature, and has been held to apply to all windings-up, and to mean *pari passu* in satisfaction of the liabilities as they existed at the commencement of the winding-up.

The liability while the company is a going concern and the statutory liability under a winding-up are in fact totally different.

In *In re Phœnix Bessemer Steel Company* (3) the present point was not raised. In *Stanley's Case* (4) the words were not wide enough, and the point was not discussed. In *Grissell's Case* (5), *Chelmsford*, L.C., held that there could be no set-off, because the contribution in the winding-up was not and never could be a debt of the company; and in *Ex parte Mackenzie* (6), *Romilly*, M.R., held that the debt in the liquidation accrued on the winding-up. *Webb* v. *Whiffin* (7) shews that a company cannot release from the liability to contribute; and if it cannot release from the

(1) 3 Sm. & Giff. 272; 6 D. M. & G. 572.
(2) Law Rep. 10 Eq. 629, 631.
(3) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(4) 4 D. J. & S. 407.
(5) Law Rep. 1 Ch. 528.
(6) Ibid. 7 Eq. 240.
(7) Ibid. 5 H. L. 711, 728.

liability to contribute, it cannot mortgage the contribution. *In re Whitehouse & Co.* (1) shews that a mortgage of a call already made is bad, unless the call actually comes in before the winding-up. *Burgess's Case* (2) and *Howard* v. *Patent Ivory Manufacturing Company* (3) only follow *In re Phœnix Bessemer Steel Company* (4).

As to the powers conferred by the memorandum and articles of association, it is impossible to say what proportion of the uncalled capital may be included in a mortgage, for no definite portion of the uncalled capital is charged; and we contend that these mortgages are absolutely bad where the company is wound up, and if not wholly bad, are bad to the extent to which they infringe *Grissell's Case* (5).

It is submitted that the liability of members of a company, under the *Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 38, is a new liability, and is analogous to the ordinary liability in bankruptcy. It is of the same nature whether the company be limited or unlimited, and it applies equally to past and to present members, though the liability is limited in some cases, and not in others. The company when a going concern cannot mortgage any such liability as this; and it does not matter whether the memorandum or articles of association profess to give such a power. A liability to contribute is in no shape or way a debt due to the company; but it would be deemed to be a debt after a call was made by the company as a going concern. Here, however, the company never can make a call; therefore the liability never occurred and never can occur. The decision in *In re Whitehouse & Co.* represents the view which is taken by and on behalf of the unsecured creditors; but that case and others in reference to this question were cases of construction and before Courts of First Instance, and it is submitted that the point now raised is a new one, and that the Court can deal with it independently of those decisions. These calls never were the property of the company and never can be, the company being in liquidation; therefore it is a matter over which the company

(1) 9 Ch. D. 595, 599.
(2) 15 Ch. D. 507, 509.
(3) 38 Ch. D. 156.
(4) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(5) Law Rep. 1 Ch. 528.

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had no concern, and could not exercise any power, in any shape, sense, or way over it, *i.e.*, as a debt in regard to which the company could deal: *Burgess's Case* (1). There are also the cases of *Stanley's Case* (2); *Bank of South Australia* v. *Abrahams* (3); *In re Phœnix Bessemer Steel Company* (4).

[STIRLING, J.:—According to the decision in *In re Phœnix Bessemer Steel Company*, it would seem that the present case is covered by authority.]

It is submitted that the decision in that case was wrong. What Sir *George Jessel*, M.R., said there was not to the point, inasmuch as the mortgage had been forged. Then there is the case of *Black & Co.* (5), in which the contrary decision of the Court of Common Pleas in *Brighton Arcade Company* v. *Dowling* (6) was disapproved of, and which shews that these mortgages, which as to three of them were taken by shareholders, are bad and can have no operation against creditors. If what the mortgagees seek to enforce here be the law, an unlimited company would be able to mortgage the whole of the fortune of every man who was a shareholder in it.

It should be observed that there is no covenant by the company in the mortgages to call up any moneys; but the company might have done so if it had chosen to make a call to pay debts. No reference was made to a winding-up; they were to be calls made by and only by the company. If the company were a going concern, art. 111 might have been operative, as the contracts were for value: *Holroyd* v. *Marshall* (7). By sect. 25 of the *Companies Act*, 1862, a register has to be kept in order, that full information may be given to persons dealing with the company —creditors or members of the company. It is very important that it should be known how much capital was unpaid and liable for the satisfaction of the company's debts. The assets of the company should be ordered to be applied *pari passu* amongst all the creditors. The only priority allowed is by the *Companies Amendment Act* of 1883 (46 & 47 Vict. c. 28), which gives a

(1) 15 Ch. D. 507.
(2) 4 D. J. & S. 407.
(3) Law Rep. 6 P. C. 265.
(4) 44 L. J. (Ch.) 683; 32 L. T.(N.S.) 854.
(5) Law Rep. 8 Ch. 254.
(6) Ibid. 3 C. P. 175.
(7) 10 H. L. C. 191.

preference to wages and salaries only. It would be a great hardship here to allow this capital to be taken away from the unsecured creditors, and to say that the mortgagees are entitled to be paid in priority. The summonses should be dismissed.

[*Gill's Case* (1), *Trevor* v. *Whitworth* (2), *Wright* v. *Horton* (3), *Muir* v. *City of Glasgow Bank* (4), and *Palmer's* Company Precedents (5), were also referred to.]

Hastings, in reply, submitted that the directors had power to mortgage unpaid calls, and that it was too late to dispute that right now, after the many decisions which had been given on the point; and that if the power was good as regarded strangers, it was good as regarded shareholders.

Buckley, also in reply:—

The statute left the company to decide how and when calls should be made and dealt with. That is the principle upon which the cases decided have gone, and it was competent to the company to say that they would forestall the amounts of the calls by assignment or mortgage, or by giving a security for the value received. That has always been treated as a matter of regulation, and bankers and others have advanced moneys upon the security of unpaid calls, and the mortgagees in this case are entitled to be paid in priority.

1890. Jan. 13. STIRLING, J. (after stating the facts, continued):—

It was laid down in *Bank of South Australia* v. *Abrahams* (6), that (7), the right of a company to unpaid capital "is, strictly speaking, more in the nature of power than of property; and, although that which a man has power to make his own may be charged, as well as that which is actually his, it requires apt and proper words, or a sufficient context, to have this effect." It was held by Sir *G. Jessel*, M.R., in the case of *In re Phœnix Bessemer*

(1) 12 Ch. D. 755.
(2) 12 App. Cas. 409.
(3) Ibid. 371, 376.
(4) 6 Court Sess. Cas. 4th Series, 392, 401.
(5) 4th Ed. p. 385.
(6) Law Rep. 6 P. C. 265.
(7) Law Rep. 6 P. C. 271.

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Steel Company (1), that the apt and proper words, or sufficient context, need not be found in the memorandum of association, and that it is sufficient if they are contained in contemporaneous articles of association. The principles on which he arrived at this conclusion are thus stated (2): "The memorandum and articles are contemporaneous documents, and the rule of construction is, that if contemporaneous documents can be read in two ways, in one of which they appear consistent and in the other inconsistent, the construction is to be preferred which will render them consistent. Another principle is, that if one of two contemporaneous documents is ambiguous in its terms, but the other is clear, then force is to be given to the one whose terms are clear, so as to interpret the one containing ambiguous terms." Similar principles were laid down by the same learned Judge in the case of *Harrison* v. *Mexican Railway Company* (3), and, so far as they relate to the matter now under consideration, do not appear to be affected by the qualifications suggested by the Court of Appeal in *Guinness* v. *Land Corporation of Ireland* (4). I propose to act upon that view of the law. Now, the memorandum of association in the present case empowers the company "to borrow money by mortgage or otherwise." Mortgage of what? The contemporaneous articles of association say, "On mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled." Those words read with those in the memorandum of association authorize a mortgage of uncalled capital certainly along with other property of the company to secure an advance. Further, the memorandum authorizes the issue of "mortgage debenture and other securities . . . . founded on all or any of the real and personal assets or on the credit of the company." If it be conceded (as was contended in argument) that the strict or primary meaning of the word "assets" is property, and that it would not include uncalled capital in the absence of a context, still the articles of association shew that uncalled capital

(1) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(2) 44 L. J. (Ch.) 685.
(3) Law Rep. 19 Eq. 358.
(4) 22 Ch. D. 349.

was intended to be available as the subject-matter of a security, and I should therefore hold, if necessary, that there is here found a context sufficient to shew that the word "assets" is used in a sense which includes uncalled capital. I am of opinion, therefore, that the mortgage of the 3rd of January, 1882, which included both uncalled capital and other property of the company, is authorized by the terms of article 111. In the other mortgages the subject-matter of the security is uncalled capital only; and it was suggested that as they include no part of the property of the company, strictly so called, they do not fall within article 111. In my opinion, however, article 111 clearly shews an intent that the company should have power to mortgage uncalled capital, and I think it would be too narrow a construction to hold that the words "such mortgage" must necessarily mean a mortgage including some part, however small, of the property of the company as distinguished from that which the company has power to make its own; and I prefer to read the words "such mortgage" as meaning a mortgage given to secure money borrowed. In my opinion, therefore, the mortgages of the 10th of August and of the 28th of October, 1887, are within the power. There remains the question whether such a mortgage may be given by way of indemnity, as in the case of the deed of the 3rd of May, 1886. The consideration of this I postpone for the present; and I proceed to consider whether these charges which I have held to be valid are effectual against unsecured creditors as regards calls made in the winding-up, it being contended that a company formed under the *Companies Act*, 1862, has no power to bind such calls, whatever may be its powers as regards calls made by the directors. Now, the order made in *In re Phœnix Bessemer Steel Company* (1), already referred to (of which I have obtained a copy), contained an expression of opinion that the mortgagees had under their mortgage a first charge on the unpaid capital of the company and on the proceeds of all future calls made and to be made on the shares of the company; and it was ordered that the liquidators should get in all the unpaid capital under the direction of the Judge, and should place the same and the proceeds of all future calls to be

(1) 44 L. J. (Ch.) 683.

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made on the shares of the company to a separate account to be entitled, "Calls in respect of Unpaid Capital"; and the unpaid capital and the proceeds of any future calls were not to be dealt with by the liquidators without notice to the applicants—the mortgagees. It therefore appears that the mortgagees were recognised and dealt with by the Court as having a charge not only on calls made by the directors, but on those to be made in the winding-up; but no notice of any suggestion of a difference between them is to be found either in the arguments of counsel or in the judgment of Sir *G. Jessel* as reported. A similar decision appears to have been given by Mr. Justice *Kay* in *Howard* v. *Patent Ivory Manufacturing Company* (1); but in that case also there was a like silence as to any distinction between calls made before and those made after the commencement of the winding-up. It is now contended that those decisions ought not to be followed on the ground that they were inconsistent, if not with other cases binding upon me, at all events with the grounds on which the decisions in those cases were based. Before proceeding to consider those cases, I may remark that in the earliest or one of the earliest cases in which the validity of a mortgage of unpaid capital was considered—viz., *Stanley's Case* (2)—Lord Justice *Turner* appears to have in part rested his decision against the validity of the charge on the ground that it would be inconsistent with the discretion vested in the directors as to the making of calls. That, however, was set aside in the *Phœnix Bessemer Case* (3) by Sir *G. Jessel*, who relied mainly on the analogy furnished by sect. 38 of the *Companies Clauses Act*, 1845 (8 Vict. c. 16), which expressly confers power "to mortgage the undertaking and the future calls on the shareholders." In *In re Sankey Brook Coal Company* (4), a charge was given on the proceeds of a call proposed to be but not actually made. The call was afterwards made; but before the proceeds were got in a winding-up commenced. It was held by Lord Justice (then Vice-Chancellor) *James* that the charge was valid, and the liquidators were ordered to apply the proceeds of the call towards payment

(1) 38 Ch. D. 156.
(2) 4 D. J. & S. 407.
(3) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(4) Law Rep. 9 Eq. 721.

of the debt secured by the charge. I do not, however, treat that as an authority directly in favour of the mortgagees in the present case; for the order made in *In re Sankey Brook Coal Company* (1) related to the proceeds, not of a call made by the liquidators, but of one made by the directors, which, as is shewn by *Stone* v. *City and County Bank* (2), the liquidator had power to enforce. It may be thought—and it was suggested in argument—that a directors' call so enforced is subject to charges from which a call made by the liquidator would be free. The cases on which reliance was placed in opposition to the summonses were mainly, *Grissell's Case* (3); *Black & Co.'s Case* (4), and *In re Whitehouse & Co.* (5), all of which were decided on the terms of the *Companies Act*, 1862, and particularly on sects. 16, 38, 75, 98, 101, and 103.

By sect. 16 it is provided that "the articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber, in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in *Scotland* as well as in *England* and *Ireland*: When registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators to conform to all the regulations contained in such articles subject to the provisions of this Act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company, and in *England* and *Ireland* to be in the nature of a specialty debt."

That relates to moneys payable in pursuance of the conditions and regulations of the company.

In sect. 38 there are provisions, "In the event of a company formed under this Act being wound up"; amongst which is

(1) Law Rep. 9 Eq. 721.
(2) 3 C. P. D. 282.
(3) Law Rep. 1 Ch. 528.
(4) Ibid. 8 Ch. 254.
(5) 9 Ch. D. 595.

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sub-sect. 4, which I ought to read: "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member." The word "unpaid" was dealt with by the late Master of the Rolls (Sir *George Jessel*) in *In re Whitehouse & Co.* (1), which I shall presently refer to.

In sect. 75 we have this: "The liability of any person to contribute to the assets of a company under this Act, in the event of the same being wound up, shall be deemed to create a debt (in *England* and *Ireland* of the nature of a specialty) accruing due from such person at the time when his liability commenced, but payable at the time or respective times when calls are made as hereinafter mentioned for enforcing such liability". . . . .

It is quite plain, therefore, in sects. 38 and 75, that the liability under sect. 38 is treated in the Act as a different liability from that which is created by sect. 16.

By sect. 98 it is provided: "As soon as may be after making an order for winding up the company, the Court shall settle a list of contributories, with power to rectify the register of members in all cases where such rectification is required in pursuance of this Act, and shall cause the assets of the company to be collected, and applied in discharge of its liabilities."

Sect. 101 is this: "The Court may, at any time after making an order for winding up the company, make an order on any contributory for the time being settled on the list of contributories directing payment to be made, in manner in the said order mentioned, of any moneys due from him or from the estate of the person whom he represents to the company, exclusive of any moneys which he or the estate of the person whom he represents may be liable to contribute by virtue of any call made or to be made by the Court in pursuance of this part of this Act." That excludes from the operation of sect. 101 contribution under sect. 38. "And it may, in making such order, when the company is not limited, allow to such contributory by way of set-off any moneys due to him or the estate which he represents from the company, on any independent dealing or

(1) 9 Ch. D. 595.

contract with the company, but not any moneys due to him as a member of the company in respect of any dividend or profit: Provided that when all the creditors of any company whether limited or unlimited, are paid in full, any moneys due on any account whatever to any contributory from the company may be allowed to him by way of set-off against any subsequent call or calls."

Sect. 133 (which deals with a voluntary winding-up), sub-sect. 1, provides that, "The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company."

Now, in *Grissell's Case* (1) the company was being wound up under supervision; calls were made in the winding-up, and the question was, what were the rights of a contributory who was also a creditor of the company? It was held that the debt could not be set-off against the calls, but that the contributory must first pay his calls, and then he would be entitled to receive a dividend *pari passu* with the other creditors. Lord *Chelmsford*, in giving the judgment of the Court, said (2): "The question depends entirely upon the construction of the *Companies Act*, 1862. . . . . In considering the questions involved in these applications, the primary intention of the Legislature in the provisions relating to the winding-up of companies must be regarded. That intention is expressed in the 133rd section of the Act, being that 'the property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company.'"

Then, later on, his Lordship said (3): "It appears to me to be quite clear that the amount of the call not paid cannot be set-off against the debt. The Act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the rights and

(1) Law Rep. 1 Ch. 528. (2) Law Rep. 1 Ch. 534.
(3) Law Rep. 1 Ch. 535, 536.

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liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the Act as a whole, the call is to come into the assets of the company, to be applied with the other assets in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the Act. In support of this view, it will be sufficient to refer again to the 133rd section as to the satisfaction of the liabilities of the company *pari passu*." Then his Lordship went on to deal with sect. 101, which he relied upon, but into which I think I need not enter.

In *Black & Co.'s Case* (1), the company was being wound up by the Court. The contributories had entered into an agreement with the company for the supply of locomotive engines, one term of which was that during the continuance of the agreement the contributories might set-off against the calls upon all or any of their shares the amount due to them from the company for which they held the company's acceptances. It was held that this special contract as to set-off was not available as regards unpaid calls made in the winding-up. The Lord Chancellor Lord *Selborne*, said (2): "The point, therefore, which his Honour Sir *James Bacon*, V.C.), has decided is simply this: that a company may contract with one of its shareholders, so as to take him, in case of a winding-up, out of the law laid down in *Grissell's Case*, and give him, in substance, a right to be paid out of his own calls in preference to other creditors; which right, but for such special contract, he would not have had. It is probably enough to say that the law generally has been settled by *Grissell's Case* (3) upon the interpretation of the Act of Parliament, and of the rules laid down in that Act of Parliament, as to the mode in which, under a winding-up, the money arising from calls is to be applied in payment of the debts of the creditors, *pari passu*, and without preference. That case (being decided by an authority which we ought to treat as binding on ourselves, even if we doubted that it was right) has determined that in general such a set-off is not to be allowed. That decision being founded upon the interpretation of the Act of Parliament, it is

(1) Law Rep. 8 Ch. 254. (2) Law Rep. 8 Ch. 260, 261.
(3) Law Rep. 1 Ch. 528.

very difficult to understand how it can be seriously argued that a company and one of its shareholders can, by any agreement they choose to enter into between themselves, override, and relieve themselves from the operation of the Act of Parliament. The principle of the winding-up enactments is like that of the *Bankruptcy Acts*." Then, after some further remarks, his Lordship said: "That being so, it is impossible to entertain the idea that, if the law is as laid down in that case, any company can, by any private contract, take a particular creditor, who is also a shareholder, out of the operation of that law unless the contract comes within the permissive portion of the 25th section of the Act of 1867. But in this case the course prescribed by that section has not been followed, and I do not propose to say more on the subject, except that I greatly doubt whether that Act does not supply additional reason against holding that the set-off in this case can be allowed."

His Lordship then went on to deal with the case decided by the Court of Common Pleas of the *Brighton Arcade Company* v. *Dowling* (1), in which it was held that the decision in *Grissell's Case* (2) did not apply to a company which was being voluntarily wound up; and then his Lordship dealt with the ordinary law of set-off, and having asked the question, "What is the ordinary law of set-off?" and dealt with it, said: "Here the rights are substantially different. The moment that the winding-up takes place, the whole administration is carried on with a view to the payment of the debts of the creditors, and in the first instance to payment *pari passu*. The different sections of the Act—those which define the liability of limited companies, the 7th, 8th, 23rd, and 38th—those which deal with the administration of assets, the 98th, 101st, and 133rd—those which give the power to make calls, not in the ordinary way, but specially for the purposes of this Act, the 102nd and 133rd—all have in view the payment, *pari passu* and equally, of the debts due to the creditors; and the hand which receives the calls necessarily receives them as a statutory trustee for the equal and rateable payment of all the creditors. The result of this contention, that one particular creditor may pay himself in full by retaining his own calls and

(1) Law Rep. 3 C. P. 175. (2) Law Rep. 1 Ch. 528.

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not paying them, would, in effect, be to give him a preference, and to exonerate him from his obligation as a shareholder to contribute towards the payment of the debts of the other creditors." Lord Justice *James* simply concurred; but there are a few words in Lord Justice *Mellish's* judgment which I desire to read (1): "Then the 98th section says that the assets, which clearly include the unpaid portions of all shares, are to be applied in discharge of the liabilities. If the case stood upon that section alone it might be a very considerable question whether the meaning was not that the money was to be called up and applied among all the creditors, so that the shareholder should only receive his share of his debt; but that is, in my judgment, made quite clear by the 101st section. Although that section does not in terms say that there is to be no set-off, yet it shews that the legislature, in framing that section, thought that it had already been enacted that there should be no set-off, because in the 101st section they proceed to say that where there is unlimited liability, then, in the case of any independent contract, there may be a set-off."

In *In re Whitehouse & Co.* (2) the late Master of the Rolls (Sir *George Jessel*) applied the same principles to the case of a purely voluntary winding-up, notwithstanding the case of the *Brighton Arcade Company* v. *Dowling* (3) to which I have referred, and which had been already dealt with and doubted in *Black & Co.'s Case* (4). Sir *George Jessel*, in his judgment, began with the Common Law right of set-off—the ordinary right of set-off—and after dealing with that, said (5): "Before going into the details of that Act, I may state the scheme of the Act as regards winding-up—which was this, that the assets of the company were to be collected by the liquidator and distributed among the creditors; and in the case of an insolvent company it was very like bankruptcy; but if the assets were to be so distributed, of course, if the liquidator sued in his own name, he would not be indebted at all to the man to whom the company was indebted, and there would be no strict right of set-off. Whether that was affected or not by the provisions of the Act that enabled him to sue in the

(1) Law Rep. 8 Ch. 265.
(2) 9 Ch. D. 595.
(3) Law Rep. 3 C. P. 175.
(4) Ibid. 8 Ch. 254.
(5) 9 Ch. D. 598.

name of the company, I will consider further on. If he comes under those sections—notably the 138th section—in a voluntary winding-up, he comes in his own name as liquidator to enforce a call, and, strictly speaking, there is no actual set-off, because he is not indebted. If, therefore, you want a set-off at all, you must shew some provision in the Act itself giving the right of set-off, because in principle there is no such right. The debt due to the liquidator is distributable among the creditors, and the debt due to the individual from the company would only rank with the view of obtaining a dividend for the creditor for the amount due." Then subsequently (1) the Master of the Rolls dealt with sub-sect. 4 of the 38th section, which I have already read, and then said this: "Now, first of all, as regards the calls made in the winding-up, they being calls for something unpaid on the shares, that is a contribution due by the member under the Act, and is not a debt due to the company. The contribution also under this section applies to the unpaid calls made before the winding-up; because, though that is a debt due to the company, it is not the less an amount unpaid on the shares in respect of which he is liable, and therefore he must be liable to contribute all that is unpaid on his shares. As I said before, it is as much unpaid if he had not paid the calls made before the winding-up, as it is in respect of the amount unpaid on the shares in respect of which no call has been made before the winding-up." So that the Master of the Rolls thought that the principle of *Grissell's Case* (2) extended not merely to calls made in the winding-up, but also to calls made prior to the winding-up. His Lordship dealt afterwards with the question which he had referred to in the early part of his judgment—whether there was any difference where the action was brought in the name of the company at Common Law, and he came to the conclusion that there was not; but it is not necessary for me to go through that part of the judgment.

It thus appears that *Grissell's Case* and *In re Whitehouse & Co.* (3) related to the ordinary right of set-off, and that *Black & Co.'s Case* (4) related to a right of set-off conferred by contract. None of them dealt in any way with the effect of a charge given

(1) 9 Ch. D. 600.
(2) Law Rep. 1 Ch. 528.
(3) 9 Ch. D. 595.
(4) Law Rep. 8 Ch. 254.

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for valuable consideration. That subject is alluded to in the argument in *Black & Co.'s Case* (1); but not (so far as I have observed) in the judgment; and the terms of the agreement which were relied on by the contributories in that case were not apparently such as could be treated as creating an equitable assignment of the unpaid calls. In all these cases it was held that the right of set-off could not prevail—that is to say, that the liquidator was entitled to receive the calls in full, undiminished and unaffected by any indebtedness on the part of the company to the person by whom the calls were payable. Here it is admitted that the calls are to be paid in full; the question is, how is the liquidator to apply them when received—whether *pari passu* among all the creditors, or in satisfaction of the debts of the mortgagees in whose favour charges have been created on the unpaid capital? The decisions in the three cases cited to which I have referred are, therefore, not in point; but reliance was placed on the language made use of in the judgments, which, if taken literally, appears to be strongly in favour of the contention on the part of the general creditors. It is, however, to be borne in mind that those judgments were given with reference to cases none of which involved the consideration of the effect of a charge upon unpaid capital. Apart from decision, the argument in favour of the mortgagees is thus put: By sect. 38 there is imposed a liability to contribute to the "assets of the company" in the event of its being wound up. By sect. 98, the Court is to cause the "assets of the company to be collected and applied in discharge of its liabilities"; and by sect. 133 "the property of the company" a term which has been held to have the same meaning as "assets of the company"—*Webb* v. *Whiffin* (2)—"shall be applied in satisfaction of its liabilities *pari passu*." The proceeds of the calls made in the winding-up therefore become, as was held in *Webb* v. *Whiffin*, part of the "assets" or property of the company.

Now, in dealing with other portions of those "assets" or that "property," the liquidator would be bound to have regard to any equitable charges duly created thereon (including, of course, such charges as were held by the House of Lords to be valid in

(1) Law Rep. 8 Ch. 254. (2) Law Rep. 5 H. L. 711, 724.

the cases of *Holroyd* v. *Marshall* (1), and *Tailby* v. *Official Receiver* (2)), and to apply the proceeds of the realization of such specific parts of the assets, first, in payment of the sum due on the charge; and, secondly, and only secondly, in payment of the general creditors *pari passu*. It was said on behalf of the mortgagees that the like course ought to be followed with respect to the proceeds of calls made in the winding-up. On the other hand, it was said on behalf of the general creditors that the language of the Act of 1862 is such as to prohibit any application of the proceeds of calls made in the winding-up in favour of specific mortgagees, and that all such proceeds must be divided *pari passu* among the creditors of the company. This contention appears to be now, for the first time, explicitly raised for judicial decision; and in dealing with it a Court of First Instance is bound, I apprehend, to have regard to the current of decisions on the Act of 1862. Now, in the cases relating to set-off, the Courts which decided them did not place exclusive reliance on sects. 98 and 133; each of them attached weight to sect. 101, which was treated (as it was put by Lord Justice *Mellish* in *Black & Co.'s Case*) as shewing (3) "that the legislature in framing that section thought it had already been enacted that there should be no set-off."

No section of the *Companies Act*, 1862, so conclusively negatives the validity of a charge on calls in the winding-up as sect. 101 negatives the right of set-off. Reference was made in argument to sects. 25, 26, and 32, which impose on the company the duty of giving information to the public on certain matters, and amongst others as to the amount of calls made on each share, the total amount of calls received, and the total amount of calls unpaid; and it was said that a member of the public proposing to deal with the company would be misled if a charge on unpaid capital as to which he had no notice or means of obtaining information were held to be valid. The same argument would shew that a charge on a call made, but remaining unpaid, ought not to be held valid; yet effect was given to such a charge in *In re Sankey Brook Coal Company* (4). I may also add that if the observations

(1) 10 H. L. C. 191.
(2) 13 App. Cas. 523.
(3) Law Rep. 8 Ch. 265.
(4) Ibid. 9 Eq. 721.

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of Sir *G. Jessel* in *In re Whitehouse & Co.* (1) are to be understood as applying to a charge as well as to a right of set-off, I have a difficulty in seeing how those of them which relate to calls made by directors while the company was a going concern, but remaining unpaid at the commencement of the winding-up, are to be reconciled with the decision in the case of *In re Sankey Brook Coal Company* (2). Again, as has been already pointed out, the validity of mortgages of future calls, when apt and proper words are used or a sufficient context is found, is recognized in the judgment delivered by Lord Justice *James* in *Bank of South Australia* v. *Abrahams* (3). In that case the calls sought to be affected by the mortgage had been made in the winding-up, and the distinction now sought to be drawn between calls made by directors and calls made in a winding-up cannot, I think, have commended itself to the Lord Justice or the other eminent Judges who took part in the decision. It is difficult to suppose that the Judicial Committee meant to recognize the existence of a power to create a mortgage which would fail at the moment when it was most wanted—*viz.*, when the company had become insolvent and was being wound up—any more than that the Legislature meant to confer such power only upon companies governed by the *Companies Clauses Act*, 1845 (8 Vict. c. 16), some of which, it is to be remembered, may be wound up under the *Companies Act*, 1862. Looking at these circumstances, and finding two decisions in favour of the mortgagees, it is enough for me to say that the weight of authority appears to me to be in favour of their contention; and I therefore propose to follow the decision in *In re Phœnix Bessemer Steel Company* (4). I do so all the more readily as there is reason to believe that that case has been followed in Chambers, and has been to a considerable extent relied upon by persons dealing with joint stock companies during the fifteen years which have elapsed since it was decided.

One point still remains to be considered. It appears that some of the mortgagees are themselves shareholders of the company, and it was contended that, even if the mortgages were good as regards the calls on the shares of third parties, they were invalid

(1) 9 Ch. D. 595.
(2) Law Rep. 9 Eq. 721.
(3) Law Rep. 6 P. C. 265.
(4) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.

as regards calls on the mortgagees' own shares. If, however, there exists a power of mortgaging future calls it seems to me that it must extend to calls on the shares of mortgagees as well as of other persons; and that the calls on the shares of mortgagees are as applicable in payment of the mortgagees' debt as are calls on the shares of third parties.

I hold, therefore, that the claims of the mortgagees under the mortgages of the 3rd of January, 1882, of the 10th of August, 1887, and of the 28th of October, 1887, are well founded. As regards the mortgage of the 3rd of May, 1886, it appears to me to go a step beyond those which were upheld in *In re Inns of Court Hotel Company* (1) and *Howard* v. *Patent Ivory Manufacturing Company* (2). I do not say at present that it is invalid; but I think it would be desirable to know something more of the circumstances under which that mortgage was given than is contained in the affidavits now before the Court; and I propose to postpone my decision on this part of the case until this information has been furnished to the Court.

T. F. M.
W. W. K.

C. A.

From this decision Messrs. *Swan & McQueen* appealed.

The appeal was heard on March 18th, 20th, 21st, and 22nd, 1890.

Rigby, Q.C., *Beale*, Q.C., and *T. H. Carson*, for the Appellants:—

Assuming that under the memorandum and articles the directors had power to make a binding mortgage of future calls, that could only operate while the company was a going concern: they had no power to affect calls made in the winding-up. While the company is going on the members are bound by their mutual contract, and that is capital which the memorandum and articles say is capital; but when the company is wound up the law does not look at the contract, but at the legal liability of the members to the creditors. The liability, under sect. 38 of the *Companies Act*, 1862, of the members to contribute in case of a winding-up is no part of the capital of the company; it is measured by the

(1) Law Rep. 6 Eq. 82. (2) 38 Ch. D. 156.

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amount of the capital, but is not itself capital. In the case of a company limited by guarantee, or of an unlimited company, how can it be said that the liability of the members is capital?

[LINDLEY, L.J.:—Why not? Is not the capital of an unlimited company the capital that has been called up, and so much more as the company wants?]

The calls made by the liquidator in the winding-up are a fund created by the Legislature for division among the creditors *pari passu*, and not to be applied in any other way. The 38th and 102nd sections, which give the power to make calls in a winding-up on the contributories, do not say that the liquidator is to call up the unpaid capital, but that he is to make calls on the contributories to the extent of their liability for the payment of such sums as may be necessary to satisfy the debts. If the directors can forestall the calls in the winding-up, no creditor would know what the real condition of the company was; for, although the mortgages are registered, the register is not open to the public. If the directors can mortgage the calls in the winding-up, they can also sell them, and so actually destroy the funds intended for the creditors: *Stanley's Case* (1); *Bank of South Australia* v. *Abrahams* (2). In the cases relied on by the other side in the Court below the distinction between calls made by the directors while the company is going on and those made by the liquidator was not fully argued.

The case of *In re General South American Company* (3) only decided that the bonds were not invalid because they were in terms wide enough to include future calls, there being no future calls that could be made. In *Bank of South Australia* v. *Abrahams* the Privy Council held that on the construction of the deed it did not purport to charge uncalled-up capital: they did not intimate that if it had done so the charge would have been effectual. In *In re Sankey Brook Coal Company* (4) effect was given to a charge on a call, but the call was a call already determined to be made; so that the Vice-Chancellor assimilated the case to that of a charge on arrears of calls. *In re Sankey*

(1) 4 D. J. & S. 407.
(2) Law Rep. 6 P. C. 265.
(3) 2 Ch. D. 237.
(4) Law Rep. 9 Eq. 721.

Brook Coal Company (No. 2) (1) went on the same principle, and the proceeds of a future call were excluded, the Vice-Chancellor treating the case as governed by *Stanley's Case* (2). *Lishman's Case* (3) has been disapproved of (4). No analogy can be drawn between limited companies and companies constituted under the *Companies Clauses Consolidation Act*, 1845, and who have power, under sect. 38, to mortgage future calls. In the case of the latter companies Parliament regulates the capital and fixes it at what is likely to be wanted; but it is the object of a limited company to keep part of its capital not called up. Take the case of a company limited by guarantee under the *Companies Act*, 1862, sect. 9. Can it be contended that calls to be made under it could be mortgaged? There is another class of cases which has a bearing on the present—the cases as to set-off. In *Grissell's Case* (5) it is said: "The Act creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual members. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the Act as a whole, the call is to come into the assets of the company, to be applied with the other assets in payment of debts." The other assets may be equities of redemption, but the whole of the calls must come in. It was argued in that case, and justly, that to allow set-off would be a snare to the public: and so here, sect. 26 would be a snare to an outsider who trusts the company on the ground of there being a large amount of uncalled capital, if that capital could be anticipated by mortgaging it. The case of *Webb* v. *Whiffin* (6), as to B contributories proceeds on the principle that a statutory fund is created for payment of debts, the application of which fund is entirely governed by the directions of the Act, and *pari passu* distribution is the rule. In *Black & Co.'s Case* (7) the argument turned on set-off, though the case was not really one of set-off. There was a bargain for a set-off against calls which really was in the

(1) Law Rep. 10 Eq. 381.
(2) 4 D. J. & S. 407.
(3) 19 W. R. 344; 23 L. T. (N.S.) 759.
(4) Law Rep. 6 P. C. 270.
(5) Ibid. 1 Ch. 528, 535.
(6) Ibid. 5 H. L. 711.
(7) Ibid. 8 Ch. 254.

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nature of a charge; and it was held that such a bargain could not be made. It is there said (1) that *Grissell's Case* (2) establishes that money raised by calls is to be applied in payment of debts *pari passu*. Again (3), various sections are referred to as proceeding on the same principle; and it is also said (4) that no antecedent contract can alter the administration of the assets. It was there held that the allowing a creditor to retain his debt out of calls made on him was contrary to the provisions of the Act. Mr. Justice *Stirling* has attached too great importance to sect. 101. That section is only intended to prevent the necessity of bringing an action against a person who owes money to the company, and it allows him the same set-off as he would have if an action were brought. The present case is new, but it turns on principles established by a chain of decisions. *In re Whitehouse & Co.* (5) lays them down very distinctly. There Sir *G. Jessel* says (6): "The 38th section of the Act, which directs what is to be paid in the case of a winding-up by the shareholders of a limited company, creates new rights. . . . That is a new liability; he is to contribute; it is a new contribution. It is a mistake to call that a debt due to the company. It is no such thing. It is not, as has been supposed, in any shape or way a debt due to the company, but it is a liability to contribute to the assets of the company; and when we look further into the Act, it will be seen that it is a liability to contribution to be enforced by the liquidator." Then it is said (7) that sect. 101 has an application to debts, but does not at all interfere with the liability to contribution. *In re Colonial Trusts Corporation* (8) proceeds on the same principle, that the liability to contribute is not property of the company. In *Burgess's Case* (9) it is shewn how completely the position of shareholders is changed by winding-up. There Sir *G. Jessel* says (10): "The liabilities are no longer the liabilities of the company except to the extent of the assets realized, which under the 38th section of the Act are to be appropriated towards the satisfaction of such liabilities, but they become

(1) Law Rep. 8 Ch. 260.
(2) Ibid. 1 Ch. 528.
(3) Ibid. 8 Ch. 262.
(4) Ibid. 264.
(5) 9 Ch. D. 595.
(6) 9 Ch. D. 599.
(7) Ibid. 601.
(8) 15 Ch. D. 465.
(9) Ibid. 507.
(10) Ibid. 512.

liabilities of the shareholders who are such at the time of the winding-up, that is, of the past and present members, including those who have been shareholders within the year; and those liabilities, as I said before, are defined by the 38th section." If this view had been presented in *In re Phœnix Bessemer Steel Company* (1) the decision would have been different. In *Birch* v. *Cropper* (2) the principles on which we rely are strongly laid down. There would be no use in the precautions imposed by the Legislature in the *Companies Act*, 1867, in the case of reducing the capital of a company, if the object could be obtained by mortgaging it. [They also referred to sects. 16, 22, 43, 75, 98, and 133 of the *Companies Act*, 1862.]

Giffard, Q.C., and *Haldane*, Q.C., for the liquidator.

Sir *H. Davey*, Q.C., and *Whinney*, for *Gautier's* summons:—

In 1875 was decided the case of *In re Phœnix Bessemer Steel Company*, which has got into the text-books and if correctly decided disposes of the present case. Since that decision there have been numerous cases in which it was argued whether particular expressions would give power to mortgage uncalled-up capital. Those arguments were idle if the present contention that the attempt to give such a power is *ultrà vires* be correct. Thus in *Bank of South Australia* v. *Abrahams* (3) the Court held that on the true construction of the articles they did not give the power; but it is clearly intimated (4) that the power, if given, would have been effectual. Although the Court has jurisdiction to overrule decisions by Courts of First Instance, it would be very dangerous to overrule one which has been acted on for fifteen years.

The chief point made against us is that the calls in winding-up are not capital of the company, but a new statutory fund which the Act directs to be applied in a particular way. We contend that this arises from a misinterpretation of the Act, and a misunderstanding of the remarks made by Judges. It must be

(1) 44 L. J. (Ch.) 683: 32 L. T. (N.S.) 854.
(2) 14 App. Cas. 525, 543.
(3) Law Rep. 6 P. C. 265.
(4) Law Rep. 6 P. C. 271.

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admitted that the liability after a winding-up order is different from what it was before, for after a winding-up order the creditors may call for an exercise of the power to make calls, which they cannot do while the company is a going concern. But the liability to pay calls arises in each case from the contract into which a person enters by taking shares. It is now established that a floating charge on the assets of a company will enable the holder to be paid in full to the prejudice of general creditors, and that is a security which is enforced when the company comes to be wound up. There is a point which has been overlooked. The *Companies Act*, 1862, contains in the body of it no express power to accept money in advance in payment of future calls, and it might be very fairly argued that such acceptance would be void as a fraud on the public. But Table A, art. 7, expressly gives such a power, which shews that the receiving money in advance of calls is authorized. Such an advance would not appear on the returns to which the public has access.

The liability of a contributory is defined by sect. 75. It is a liability arising from his being on the register. The Appellants are trying to make out two liabilities—a liability to contribute to the assets under the shareholder's original contract, and a liability to contribute in a winding-up to a statutory fund for payment of debts, What, then, is to be done with the assets arising under the former liability? It is not disputed that a security of this kind is valid against the uncalled capital while the company is a going concern; the Appellants only say that it is not good in a winding-up as against the money to be raised by calls in the winding-up. What the liquidator has to distribute he must distribute *pro ratâ*. The question is, what does he distribute? The Appellants say that what is paid under sect. 38 is not a contribution to the capital of the company. Why should it not be? The liability to contribute arises solely from the contract to take shares and pay them up in full when called upon. This section was necessary because, the company being a corporation, the members would not be liable at all without some enactment to make them so. The Appellants read sect. 38, sub-sect. 4, as only limiting a new liability imposed by the section, but it really admits an existing liability. The liability is one and the same

throughout; the only difference being that in a winding-up a different person has to enforce it. The *Companies Act*, 1867 enables a company to reduce its capital, thus lessening the amount which can be called up from each shareholder. If the view of the Appellants is correct this would not lessen the amount which each could be called upon to pay in winding-up, for the liability under winding-up is, as they say, a new liability, and there are no words in the Act to lessen it. In the *Companies Act*, 1879, the calling-up of part of the capital is put under other control in the case of winding-up, but the liability is the same. If the liability under a winding-up is a new liability, how is the old liability got rid of? In *Poole, Jackson & Whyte's Case* (1) a payment in anticipation of calls made while the company was a going concern was held on appeal to be good payment. If the decision in the present case is reversed, the general creditors will get a great part of the money twice over. That the case is within the terms of the memorandum and articles is hardly open to argument. The memorandum gives power to borrow in very wide terms, and art. 111 expressly mentions "uncalled" capital. The only argument against us is, that "capital" does not include calls made in a winding-up; and this is based on the proposition that the liability to pay calls in a winding-up is an entirely new liability.

As regards the cases which make in our favour, and which the Appellants seek to distinguish, they have nothing to say as to *In re Phœnix Bessemer Steel Company* (2). We agree that *Lishman's Case* (3) has been disapproved, and is of no authority; but no Judge has expressed disapproval of it on the ground now taken by the Appellants. In *In re Colonial Trusts Corporation* (4) the argument turned only on construction—nobody contended that the security would have been ineffectual if proper words had been used. In *In re Sankey Brook Coal Company* (*No.* 2) (5) the case was treated as depending solely on the construction of the memorandum and articles. In *In re Sankey Brook Coal Company* (6) the call which the directors contemplated making was mortgaged,

(1) 9 Ch. D. 322.
(2) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(3) 19 W. R. 344.
(4) 15 Ch. D. 465.
(5) Law Rep. 10 Eq. 381.
(6) Law Rep. 9 Eq. 721.

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but the mortgage money did not save the company. The call was made, but not paid, so it was capable of being enforced only by the liquidator. It never occurred to anyone that if the mortgage had in terms included this call the mortgage would have been ineffectual.

The Appellants rely on observations in *Grissell's Case* (1), *Black & Co.'s Case* (2), *In re Whitehouse & Co.* (3), and *Webb* v. *Whiffin* (4), but as they were all cases of set-off, the question arose between the contributories as such and the liquidator—not, as is the case here, between the company and a third party; so they are inapplicable. Moreover, they dealt only with the application of the fund constituted by sect. 38; whereas here the question is not how that fund ought to be dealt with, but what falls into it.

[COTTON, L.J.:—The observations of Lord *Selborne* in *Black & Co.'s Case* seem in favour of the Appellants.]

It may be so if divorced from the context; but the case related merely to the division of a fund in hand, and Lord *Selborne's* language ought not to be taken as laying down a general rule applicable to cases of an entirely different description.

Grissell's Case (5) only decided that there was a right of set-off given by the statute in certain cases; that the case before the Court was not one of them, and that to give the appellant a right of set-off would give him an unfair advantage. *Webb* v. *Whiffin* only decided that the calls of B contributories were part of the general assets, and not appropriated to particular debts, though the existence of those particular debts was a condition precedent. The decision is unfavourable to the Appellants, and they only rely on *dicta* detached from the context. *Burgess's Case* (6) decided only that the position of shareholders was so altered by a winding-up order that one of them could not commence proceedings to get rid of his shares, and the observations in it, having regard to the circumstances, do not support the Appellants' case. We are within the principle of *In re Inns of Court Hotel Company* (7); *In re Patent File Company* (8), where

(1) Law Rep. 1 Ch. 528, 535.
(2) Ibid. 8 Ch. 254.
(3) 9 Ch. D. 595.
(4) Law Rep. 5 H. L. 711.
(5) Law Rep. 1 Ch. 528.
(6) 15 Ch. D. 507.
(7) Law Rep. 6 Eq. 82.
(8) Ibid. 6 Ch. 83.

giving security to creditors was held to be within borrowing powers.

Buckley, Q.C., and *Ashworth James*, for *Gotto's* summons :—

The propositions on the part of the Appellants are: (1) that calls after winding-up are not part of the capital of the company; (2) that they are a special statutory fund arising from a new liability created by sect. 38; (3) that, except by way of call, it is impossible to anticipate capital so as to lessen the amount which will be distributable among the general creditors in a winding-up. The first proposition is startling. All the money of a company consists of capital brought in by the shareholders, or of profits, and now we are told that there is something else. What is capital? The formation of a company is provided for by sects. 6–10 of the *Companies Act*, 1862. In sect. 8 the expression "capital" comes in for the first time with reference to the nominal capital to be mentioned in the memorandum. Sect. 9 deals with a company limited by guarantee, and there what is got under the guarantee is only got in case of winding-up, and nothing is said about "capital." Sect. 10 deals with unlimited companies, and there again nothing is said about "capital." Stopping there, "capital" means the nominal capital mentioned in the memorandum of association of a company limited by shares. But if we look back to sect. 5 we find that the second part of the Act relates (*inter alia*) to "the distribution of the capital"; and, passing on, we find that sects. 22–37 are put under the head "distribution of capital." This all tends to the view that "capital" means what you can get from the corporators. The *Companies Act*, 1879, s. 5, is wholly inconsistent with the idea of calls by the liquidator not being included in "capital." Although under that section the reserve "capital" created by the resolution cannot be actually called up except in the event of a winding-up, yet the company is not precluded from mortgaging such reserve, provided it has power under its articles to mortgage uncalled capital.

Thus far, perhaps, the dispute is only about words; but the second proposition is of substance—that calls made by the liquidator are something new, and constitute a statutory fund which

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is to be applied in a different way from the capital. Now a liability to pay up to the nominal amount of his shares comes on a shareholder from his agreeing to take shares. If the liability to pay calls in a winding-up is a new liability, the shareholder becomes subject to two liabilities at once—a contractual one and a statutory one. Sect. 75 of the Act of 1862 points quite the other way. The liability of any person to contribute to the assets of a company in winding-up is to be deemed to create a specialty debt accruing due from the time when the liability commenced, but payable at the time when the call is made for enforcing such liability. In *Williams* v. *Harding* (1) Lord *Kingsdown* treats this as clearly shewing that the liability relates back to the taking shares; and the principle was carried out to its results in *Ex parte Hatcher* (2), and *Stone* v. *City and County Bank* (3).

Now, as to the third proposition, it is not disputed that if a call is made by the directors and paid, the amount that can be got in under sect. 38 is diminished. The Act says not a word as to the mode of making a call. The directors can make a call compulsorily on all the shareholders; but, if the company has adopted Table A, they may, under clause 7, receive advances from some of the shareholders in satisfaction of calls. It is left for the company to settle how its capital is to be got in. This state of things is altered by winding-up, and then the Court is the authority which has to decide how calls shall be made. What is there in principle to prevent an advance of money by a shareholder who trusts to getting it back when calls are made, interest being paid him in the meantime? If the argument on sect. 38 is pushed to its consequences it conflicts with Table A, clause 7. It is said that to allow a mortgage of this kind makes sect. 26 a delusion; but this is not so, for sect. 43 gives means of finding out incumbrances. An outsider has means of getting information of mortgages of calls, but he has no means of informing himself as to advances under Table A, clause 7. There is nothing in the Act to forbid such mortgages as we are dealing with here; the scope of the Act is to leave the company to deal with its capital as it thinks proper. It is urged that under the Act it is the duty

(1) Law Rep. 1 H. L. 9, 20. (2) 12 Ch. D. 284.
(3) 3 C. P. D. 282.

of the liquidator to collect the assets and apply them in a particular way. Yes; but the question is, what are the assets? Is the asset the call, or the call subject to the incumbrances on it?

Hastings, Q.C., and *Whinney*, for the Messrs. *Greenwood's* and *McIlwraith's* summons, referred to *Smith's Case* (1).

Rigby, in reply:—

As to *In re Phœnix Bessemer Steel Company* (2) and the argument that it has been acted on for fifteen years, it is strange that, if it is sound law, it has not found its way into the regular reports, and been cited by text-writers as an authority. The most recent edition of *Lindley* on Partnerships—the fifth—does not mention the case at all. *Buckley* on the Companies Acts (3), merely cites it as an authority that a charge on future calls is valid if authorized by the memorandum and articles. *Palmer's* Company Precedents (4) simply records the decision of Sir *G. Jessel* in the case, and also that of Mr. Justice *Kay* in *Howard* v. *Patent Ivory Manufacturing Company* (5). In *Chadwyck Healey* on Joint Stock Companies (6), after citing the authorities that an assignment of future calls is improper, it is said that this view has been dissented from by *Jessel*, M.R., in the *Phœnix Bessemer Case*, but that the decision does not conflict with the authorities previously referred to, "inasmuch as capital cannot be considered as property, otherwise than *sub modo*, of the company, until it is called-up." In fact, the point whether a company has power to mortgage future calls in a winding-up was not raised or argued directly in the *Phœnix Bessemer Case*. No one has ever ventured to suggest that future calls in a winding-up constitute a valid investment.

I say, therefore, that the *Phœnix Bessemer Case*, although decided so long ago, is not a landmark of the law, settling the law upon this point once for all. According to the memorandum in the present case "capital" does not include capital uncalled

(1) 11 Ch. D. 579, 587.
(2) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(3) 5th Ed. p. 157.
(4) 4th Ed. p. 385.
(5) 38 Ch. D. 156.
(6) 2nd Ed. p. 149.

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up; but whether it is capital or not, you cannot charge uncalled capital in the liquidation, because it is the main fund for the general creditors, and no matter what the language in the memorandum and articles may be, it will not confer upon a company the right to create such a charge or guarantee, for it is altogether *ultrà vires* and illegal.

Then it is said that sect. 38 of the *Companies Act*, 1862, does not impose a liability on the members of a company, but only restricts their liability. But I submit it does impose a liability —a statutory liability—on the members. The members of a company are under two distinct obligations—one a contractual obligation which may be subject to the memorandum and articles, and the other a statutory obligation under sect. 38, which is uncontrolled by any clause in the memorandum or articles. When the company is wound up the statutory obligation throws over the contractual, and the liquidator calls up the capital regardless of any contract. Sect. 75 does not deal with the contractual obligation at all; it has reference to the liability previously mentioned in sect. 38. I agree it ought not, strictly speaking, to be called a "new" liability, because it is a liability *in gremio* from the time the person becomes a shareholder. By a "new" liability I meant a liability different from the contractual liability. If the obligation were the same there could be no necessity for the two separate enactments in sects. 16 and 75. But looking at those two sections, it is clear that the one defines the contractual obligation of a member, and the other the statutory liability. The contractual liability created, for instance, by a floating charge of the kind now in question, must, in the event of a winding-up, give way to the statutory liability.

Then the question is, what is meant by "assets of the company"? It has been argued that, in the case of a floating security for a debenture debt, it only takes effect in case of a winding-up. But that is unsound, and the very case relied on—*In re Colonial Trusts Corporation* (1)—is an answer to it. The charge created by a floating security operates at once *sub modo*. If the interest on the debentures is not paid, even while the company is a going concern, a receiver may be appointed by the Court; or in some

(1) 15 Ch. D. 465.

cases the trustees of the deed can receive the assets independently of the winding-up. No doubt, so long as the interest is regularly paid, the security does not operate as an immediate charge, and the company may deal with the specific assets until failure to pay interest, in which case the receiver or the trustees can deal with them as mortgaged assets, and prevent the company from dealing with them at all. So says the late Master of the Rolls in *In re Colonial Trusts Corporation* (1).

Then as to clause 7 of Table A, I agree that Table A may be looked at as shewing what is the view of the Legislature. For instance, in *In re Barned's Banking Company* (2), where the question arose whether, under the *Companies Act*, 1862, a limited company could become a shareholder in another limited company, Lord Justice *Cairns* referred to Table A, which says that a proxy may be given by a corporation under its corporate seal, and considered that as indicating that a limited company could hold shares in another. Article 7 of Table A is the only clause in the Act which in any way suggests the manner in which the capital of a company to which Table A applies, under sect. 15 of the Act, may be paid up. The article does not refer to money lent, but to moneys "paid in advance"—that is, moneys due on the shares held by the member. It merely indicates one mode in which a member may pay up his shares; the money so advanced must be considered as paid up; and it is none the less a payment-up to all intents and purposes because the sum paid up may be charged with interest in favour of the member, such interest being payable instead of extra dividend. It is said that the money so paid up will not appear on any document open to persons dealing with the company, and that, therefore, the argument that the scheme of the Act is to provide information as to the mode in which shares have been dealt with fails. But sect. 25 expressly says that the company shall enter on its register of members "the amount paid or agreed to be considered as paid on the shares"; so that the company is bound to keep a record of all moneys advanced on shares under article 7 of Table A. Then sect. 26 says that the company "shall" make an annual return of, amongst other matters, the amount of calls made on each share, the total

(1) 15 Ch. D. 465, 473. (2) Law Rep. 3 Ch. 105.

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amount of calls received, and the total amount of calls unpaid, the word "calls" in that section having two meanings, one the act of the directors in asking for payment on the shares, and the other the sum paid. Sects. 25 and 26 in fact do not deal with advances by way of loan at all, but only with the amount paid or agreed to be considered as paid on the shares. The consistent scheme of the Act is to shew persons dealing or proposing to deal with a company what is its remaining available capital, so that they may know to what extent to give the company credit, and it is beyond the power of the company to destroy the liability thus shewn. Charging is a totally different thing from paying-up. To say that a company can mortgage its uncalled capital, or, for example, sell the liability of its members for a sum equivalent to 10 per cent. on the amount of future calls, reduces sects. 25 and 26 to an absurdity; it would, as was said in *Grissell's Case* (1), be a "snare." To make these two sections consistent, the word "call" in sect. 26 must be read in the wider sense of everything "paid up" in respect of the share, otherwise we must consider that in sect. 25 the Legislature has introduced a sensible and businesslike provision, whereas in sect. 26 it has introduced a provision neither sensible nor businesslike.

Then, as to the *Companies Act*, 1879, if the Respondents' contention is right, sect. 5 is useless, for the directors might, the day after passing the resolution reserving a portion of the capital, pass a resolution for mortgaging that reserve fund, and so defeat the intention of the Legislature, which was that a reserve fund should be created which the shareholders and the public might see could be resorted to only for the purposes of a winding-up. The Legislature were contemplating the creation not of a sham but of a real reserve.

All the authorities shew that in a winding-up the unpaid calls constitute a statutory fund for the payment of creditors, and that this fund is in no proper sense "capital" of the company. Although the liability to those calls is measured by the amount of capital remaining uncalled, that does not make it "capital"; and by no arrangement between the directors and the shareholders can it be mortgaged or sold to the prejudice of the creditors. *In re*

(1) Law Rep. 1 Ch. 528.

Phœnix Bessemer Steel Company (1) and *Howard* v. *Patent Ivory Manufacturing Company* (2) are the only cases that stand in my way; but I submit that they cannot be relied upon, for, when contrasted with other cases, the weight of authority is against them.

1890. April 1. COTTON, L.J.:—

This is an appeal from the decision of Mr. Justice *Stirling*, and the question raised is whether a mortgage of calls made in the winding-up of this company is good. The first point that has been raised is this, whether there was any power given by the memorandum and articles of association to make a charge on the uncalled-up capital. In my opinion, there was. Let us take, first of all, the memorandum. It states that one of the objects of the society is to borrow money by mortgage or otherwise, to receive money on deposit, and issue transferable and other bonds and mortgage debentures and any other securities founded or based upon all or any of the real or personal assets or on the credit of the company. Then by article 111 power is given to the directors in these terms: "They may from time to time borrow on bonds or debentures of the company, or on mortgage of all or any part of the property of the company, and either with or without including in any such mortgage all or any definite proportion of the capital of the company then uncalled, such sums of money as they from time to time think expedient." There is one of these mortgages, that of the 3rd of May, 1886, which stands in a peculiar position; but I do not propose to deal with that particular mortgage, because Mr. Justice *Stirling* has directed inquiries as to it which have not yet been answered. It was not granted for money advanced, but by way of security against any loss on a guarantee. Having regard to the memorandum and articles, in my opinion, power is there given to mortgage the uncalled capital.

But, it is said on the part of the Appellants, the calls made in the winding-up are not part of the property of the company or of the capital of the company, and for that reliance was placed on *Stanley's Case* (3). If that argument is to prevail here, not

(1) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.

(2) 38 Ch. D. 156.

(3) 4 D. J. & S. 407

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only would mortgages of calls to be made in the winding-up be bad, but mortgages of any future calls made by the directors before the winding-up would also be bad; though this latter point need not now be considered.

In *Stanley's Case* (1), however, the Lords Justices *Knight-Bruce* and *Turner* had not to deal with the case we have here, where there is express power to mortgage uncalled capital. In that case the difficulty was, as Lord Justice *Turner* points out, that there was no express power to mortgage calls not already made; and in order to get over that difficulty it was argued that there must be an implied contract in the debentures there issued, which purported to include all the capital of the company, to do whatever might be necessary for the purpose of making them an effectual security; and that, therefore, they should be held to comprise capital subscribed for but not paid up. Lord Justice *Turner* held, however, that to give such a construction to the debentures would interfere with and put an end to the discretion of the directors as to making calls expressly given to them by the company's deed of settlement. In my opinion, that case does not apply to a case like this, where, as I have said, there is, in terms, power to mortgage calls not already made at the time the mortgage is granted.

But it was said that calls which are made after the winding-up has commenced are not to be considered as part of the capital of this company. I cannot agree to that. It was argued that the liability "to contribute to the assets of the company," in the 38th section of the Act, is something entirely different from a call made by the directors before the winding-up, and that a call made after the winding-up has commenced is not to be considered as a call of part of the capital of the company.. In my opinion, that view is wrong as regards a case like this. We are considering the case of a call made in the winding-up of a limited company—not of a company limited by guarantee nor of an unlimited company. In the case of an unlimited or of a guarantee company, what can be called for in the winding-up may not be, and I think is not, considered as part of the capital of the company; but in the case of a limited company, although there is a special

(1) 4 D. J. & S. 407.

provision in sect. 38, sub-s. 4, as to what is to be done when there is a winding-up, yet that is merely giving the power to call for that part of the capital of the company which has not been called up. It is true there is a difference in the liability to and in the means of providing for calls where a company is being wound up and where it is not being wound up. If the company is not being wound up, then the power of the directors to call up that portion of the capital is different in terms from the power of the liquidator. Of course, in the case of a company which is a going company there is only a certain part of the capital called up from time to time by the directors, and there are usually restrictions put on the time within which the call shall be made; but that is done away with as regards the liquidator where a company is being wound up, for in that case the call is not payable to the directors of the company, but to the liquidator, who is freed from those restrictions which exist when the company is a going company. It is very true that *In re Whitehouse & Co.* (1), before the late Master of the Rolls, is strongly in support of the argument urged upon us by Mr. *Rigby*; but, in my opinion, that decision had reference to an entirely different question, namely, the right of set-off. Although the decision of the Master of the Rolls was right, yet in my opinion his observations upon the position of the liquidator, as regards a call made in the winding-up upon a shareholder who is also a creditor of the company and claims a right to set-off his debt against the call, were, though unintentionally, erroneous; for he disallowed the set-off in that case, not on the true ground put by the Court of Appeal in *Black & Co.'s Case* (2), but on the ground that a call is something which accrues to the liquidator, and is not a sum which is really due to the company, and that the shareholder's debt is a debt due to him from the company, and not from the liquidator.

Then *Webb* v. *Whiffin* (3) was referred to, Lord *Cairns'* judgment in that case being much relied upon. In that case the question was whether calls made upon persons settled on the B list of contributories could be appropriated for a particular portion of the creditors of the company; and the expressions

(1) 9 Ch. D. 595. (2) Law Rep. 8 Ch. 254, 261, 262, 265.
(3) Law Rep. 5 H. L. 711.

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used by Lord *Cairns* are really against the argument used by Mr. *Rigby* that calls in a winding-up are not to be considered as a part of the capital of the company; for he speaks of the whole of a capital created under the Act of 1862 as constituting a "common fund," and says that the sums obtained from the B shareholders are not to be set apart and appropriated to a particular class of creditors, but are to be thrown into that common fund for the payment of all the creditors of the company. It is clear that in speaking of the common fund he is referring to the capital of the company, for he says this (1): "As I understand that Act"—the Act of 1862—"the relation of creditor and debtor which is established by the Act is established only with regard to that which is the common fund or capital of the company." He therefore in distinct terms treats it as only that which is to be arrived at in the winding-up as part of the capital of the company, and he uses that expression again a little further on, where he says, after stating the relation between creditors and shareholder under the former *Joint Stock Companies Acts*: "But by the Act of 1862 that state of things is entirely swept away. A capital is created, sometimes limited, sometimes without a limit; but that capital is to be made good in the shape of a common fund, and that common fund it is which is to be the source of the payment of every creditor of the company;" so that Lord *Cairns* distinctly treats that which is to be called for in the winding-up from the B contributories as part of the capital of the company, and says that it is to be brought in as part of the capital or common fund for payment of the creditors.

In my opinion the Act of 1879, which was quoted on behalf of the Respondents, is not to be disregarded. What does that provide? Sect. 5 enables a limited company to make a reservation of part of its uncalled capital, so that such part can only be called up in the event of a winding-up. That distinctly recognises the capital which is being called up and can only be called up in a winding-up as a part of the capital of the company, and that I think is what this is.

Whether or not there is anything in the Act to prevent that part of the capital being mortgaged is another question; but,

(1) Law Rep. 5 H. L. 734.

in my opinion, there is no good ground for saying that a call made by a liquidator in the winding-up of a limited company like this is not a call of a part of the capital of the company. There may be certain companies in which the calls made in the winding-up cannot in any way be considered as part of the capital of the company; but here we have to deal with what, in my opinion, is part of the capital of the company.

Although Mr. *Rigby*, in his opening, strongly urged that capital which is to be called up in the winding-up is not part of the capital of the company, yet he afterwards went into what we must consider is a more serious question, namely, whether there is anything in the *Companies Act*, 1862, which prevents a mortgage being effectually made of capital which is to be called up by the liquidator in the winding-up. What he said was, that it is prohibited by the Act. Now, in the Act there is nothing in terms to negative the right to mortgage these calls which are a part of the assets and capital of the company, namely, that capital which, at the time the winding-up commences, has not been already called up. Then, as there is nothing in terms expressly preventing the directors of the company from mortgaging that part of the capital which has not already been called up, and which, as I have said, ought to be considered as part of the capital of the company, the question is whether the Act contains any necessary implication preventing the company or the directors from effectually mortgaging that part of their property.

Now, what is the argument upon that point? It is said that this part of the capital of the company—that is to say, calls made by the liquidator—ought to be applied in payment of all the unpaid creditors equally, and for that proposition reliance is placed upon sects. 98 and 133. But then the question arises, what are to be considered "assets" or "property" of the company? In my opinion the "assets" or "property" of the company which are referred to in those sections must mean that portion of the capital which the directors have not actually dealt with before the winding-up commenced. That portion of the capital, being the property of the company, must be got in by the liquidator; but if the legal estate, so to speak, is outstanding in a mortgagee,

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then the only portion of that property which the liquidator can look upon as a fund in the winding-up for payment of the debts of the creditors will be the equity of redemption, or, in other words, that portion of the property remaining after the satisfaction of all the obligations which the directors have properly thrown upon this part of the property of the company. Therefore, in my opinion, although the assets of the company must under sects. 98 and 133, be applied by the liquidator in payment *pari passu* of all the creditors then unpaid, yet property which is in mortgage is not, in my opinion, "assets" of the company in the sense in which that is to be done, namely, free assets, assets which can be dealt with by the company in payment of their debts without regard to those who have a mortgage on this portion of the property of the company.

Now, it was not said that there was anything which expressly prevents a mortgage of this portion of the capital of the company; but it is contended that the general object of the Act will be defeated if such a mortgage is held to be effectual. I confess I think it might have been better, perhaps, if there had been some prohibition in the Act against the mortgaging of calls which have not been paid; but the Act contains no such prohibition; and as the company has power to deal with their assets, and there is nothing to prevent them from dealing with this portion of their assets by mortgaging, in my opinion it would be wrong, simply because we think it would have been better if the Act had imposed such a restriction, to introduce it merely on the ground that in our view the objects of the Act—that is, the paying of all creditors equally—would be better carried into effect by preventing this property from being mortgaged. If Parliament had intended that that should not be done, I think they would have passed an enactment expressly prohibiting it; but they have not done so. Possibly they may have intended that a company should have the power of mortgaging this portion of its property; or, on the other hand, they may, unintentionally, have omitted to prohibit a company from doing so; but, however that may be, I think we ought not to introduce into the Act of Parliament that which would interfere in a serious way with the disposal by the company of that which, in my opinion, still remains its property,

and which in this case has been dealt with by the company by way of mortgage.

Then it seems to me that sect. 43 of the Act should not be disregarded; because, although it is very true that various cases have decided that a mere power to mortgage property will not of itself authorize a mortgage of unpaid calls, yet we find in that section that the directors are required to make a list of all mortgages "specifically affecting property of the company"—that is, of mortgages not merely on one part of their property, but on any part of their property, which would include any capital uncalled or unpaid when the winding-up has commenced.

Then I do not think that the *Companies Clauses Consolidation Act*, 1845, giving the power to mortgage unpaid calls, is to be disregarded. There express power is given by sect. 38 for a company to mortgage that portion of its capital which is not called up. Although that is no direct authority on this Act of 1862, yet, in my opinion, it does have a bearing upon it as shewing that the Legislature did not think it necessary in the case of companies under the Act of 1845 to prevent such mortgages, but, on the contrary, expressly authorized them.

Then, have any authorities which we are bound to follow laid down that there can be no such mortgage of unpaid calls? There is said to be no authority which we ought to follow; but it seems to me that the decided cases are against the Appellants. One cannot disregard what was said by the late Master of the Rolls in the case of *In re Phœnix Bessemer Steel Company* (1), where he treated it as undoubted law that there could be a good mortgage of this kind. The question in that case was whether, the company being in liquidation, the liquidator ought to pay the proceeds of calls to be made in the winding-up to the mortgagees of the unpaid capital of the company. What Sir *George Jessel* says is this: "The first question is, whether a company can mortgage future calls. There can be no doubt that the power can be given to a company by the articles of association." I agree that the point does not seem to have been particularly argued; but Sir *George Jessel* treats it as undoubted law, that if

(1) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.

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power is given by the memorandum and articles there can be a mortgage effectually made of this part of the capital.

Then there is the case of *Howard* v. *Patent Ivory Manufacturing Company* (1), where Mr. Justice *Kay* took the same view, though the *Phœnix Bessemer Case* (2) was not among the numerous cases there referred to on the point. Now, although those two cases were not decided by the Court of Appeal, and therefore, if we thought them clearly wrong, we should not be bound by them, yet since the decision of the late Master of the Rolls in the *Phœnix Bessemer Case*, which was decided in 1875, the point has frequently arisen as to whether in particular cases there has been an effectual mortgage of the unpaid calls, and it has never been said in any of these subsequent cases that what was said by Sir *George Jessel* is wrong. In every case in which the mortgage has been held to be ineffectual, the question has turned on this, that there was not sufficient power given by the articles to enable the mortgage to be made. Then there was a case before the Privy Council which cannot be disregarded, namely, *Bank of South Australia* v. *Abrahams* (3). There it was held that, having regard to the terms of the power of mortgaging given, the power did not include the mortgage of unpaid calls, and consequently that debentures purporting to include as security unpaid calls were invalid.

Then in *In re Sankey Brook Coal Company* (4), Lord Justice *James* decided that a power given to directors by the company's articles to "mortgage or charge the works, hereditaments, plant, property, and effects of the company" might be carried into effect by mortgaging a call already made, but not yet paid, though not by mortgaging future calls. It seems clear, if Lord Justice *James* had been of a contrary opinion to that subsequently expressed by Sir *George Jessel* in the *Phœnix Bessemer Case*, he would not have said merely that there was no power by the articles to mortgage future calls; but he would have said that, whatever might have been the power given by the articles, no effectual mortgage could have been made of future calls.

(1) 38 Ch. D. 156.
(2) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(3) Law Rep. 6 P. C. 265.
(4) Ibid. 9 Eq. 721; 10 Eq. 381.

In my opinion, therefore, it is right in this case to say that there is nothing in the *Companies Act*, 1862, which either expressly or by necessary implication prevents an effectual mortgage being made of calls unpaid at the time when the mortgage was made—that is to say, of calls not then made, but which might afterwards be made by the liquidator if there was a winding-up.

I have already said that, as regards one of these mortgages, there was some special question raised which Mr. Justice *Stirling* has given no decision upon, and, therefore, it would not be right for us to give any opinion upon that point; but I ought to mention this, that in the case of that mortgage the mortgagees are shareholders, and it was said that we ought not to allow these mortgages to be effectual in their favour because set-off is against the provisions of the Act of Parliament. I agree that so it is; but I think we ought not to consider this as a case of set-off. If, as in *Black & Co.'s Case* (1), the mortgage had purported to be a charge on the calls to be made on the shares of a particular creditor, who was also a shareholder, that might have been said to be an attempt to grant a right of set-off, which, in the case of a winding-up, is prohibited by sect. 101; but here that is not the case. The charge is not a charge only on the calls to be made on the shares of the particular persons who were shareholders as well as creditors; it is a general charge on all the unpaid assets, which in my opinion is good; and we ought not to say that is a mere grant of a right of set-off. It is a mortgage, generally, of the unpaid calls, which, in my opinion, is effectual, and ought not to be treated as bad simply because those who claim under the mortgage happen also to be, as regards part of the assets mortgaged, persons themselves bound to provide calls made on them. It seems to me that their calls, as well as the calls of other shareholders, are well and effectually bound by this mortgage. In my opinion the appeal fails.

LINDLEY, L.J.:—

In order to decide the question raised by this appeal it is necessary to study the *Companies Act*, 1862, and the Acts amending

(1) Law Rep. 8 Ch. 254.

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it, and in particular those portions of them which relate to capital, to calls, to the liabilities of members, and to the collection and distribution of assets in the event of a winding-up.

The sections which relate to capital are sect. 8, sub-s. 5, 12, 14, and 26. It is plain from these sections that what is meant by the capital of a company, having its capital divided into shares, is the nominal capital mentioned in the company's memorandum or articles of association, as the case may be. This is the sum which the directors are empowered to raise by issuing shares, and which those who take shares agree to pay to the extent of the nominal amount of the shares which they respectively hold. A power conferred by the articles of a company to call up or to mortgage or otherwise deal with its capital extends to its nominal capital and (unless restricted in terms) to the whole of such capital. But such a power does not extend to other moneys which, although raiseable in the event of a winding-up, form no part of the capital of the company.

The sections which relate to calls and to the liabilities of members in respect of their shares are sects. 7, 9, sub-sect. 4, 16, 38, 75, 101, 102, and the *Companies Act*, 1867, sect. 25. The general effect of these sections is to render each member liable to pay the full amount of his shares, and, in the case of unlimited companies and companies limited by guarantee, a further sum in the event of a winding-up, but only in that event. This liability is in the nature of a specialty debt due to the company accruing in respect of each share held from the time of its acquisition, and it is a liability which, in the case of limited companies, can only be discharged by payment in cash, unless an agreement to the contrary is duly registered.

The sections which relate to the collection and distribution of assets in the event of a winding-up are sects. 94, 95, 98, 101, 102, 133. All actions which have to be brought in order to get in the distributable assets are brought by the liquidator in the name of the company: sect. 95, sub-sect. 1: and although he is empowered to take proceedings in his own name when it is inconvenient to use the name of the company—sect. 95, sub-sect. 7—he ought not to adopt this form when there is no necessity for doing so. The form of procedure is, however, immaterial as

regards the rights and liabilities sought to be enforced: see *Ex parte Kintrea* (1). The assets, when got in are distributable *pari passu* amongst the unsecured creditors of the company; and members of a limited company cannot set off money due to them from the company against moneys which the liquidator is empowered to collect for the payment of the debts of the company.

A careful study of the foregoing enactments will be found to warrant the following inferences: 1. That uncalled-up capital on any share is money which its holder is bound to the company to pay to it when required by the proper authority. The right to require payment of this money is vested in the company, and when payment is required the amount payable is a debt due to the company in all cases, whether the payment is required before or after liquidation. 2. That the *Companies Act*, 1862, does not say when or by whom the uncalled-up capital is to be called up before the company is in liquidation. The Act leaves this matter to be regulated by the company's articles of association. But after a liquidator is appointed he is the person to exercise the power of calling it up. 3. That directors can only make calls at such times, after such notices, and of such amounts, as are prescribed in the articles of association, but liquidators are not bound to observe the articles as regards these matters; liquidators both can and must collect the assets, which it is their duty to distribute as speedily as circumstances will permit. 4. That the Act contains no clause forbidding mortgages of assets, although every mortgage withdraws from the unsecured creditors that which, but for the mortgage, would be distributable among them in a winding-up. So far from forbidding mortgages, the Act of 1862, sect. 43, requires limited companies to keep a register of all mortgages and charges of their property; from which it is obvious that such mortgages were contemplated. The members are left to decide for themselves what powers of mortgaging they will confer on their directors. All mortgages and charges by limited companies under powers conferred by their articles ought, I apprehend, to be registered under sect. 43, whether what is mortgaged or charged is, at the date of the mortgage or charge,

(1) Law Rep. 5 Ch. 95.

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existing property of the company or property which the company has only a power of acquiring and of equitably charging.

There being no prohibition in terms against mortgaging uncalled-up capital, is such a transaction forbidden by necessary implication? That is, are there provisions in the Act to which full effect cannot be given if such a transaction is upheld? I can find none. Those moneys which are payable only on a winding-up, and which by the Act are excluded from the capital of the company, are never under the control of the directors, and cannot, I apprehend, be dealt with in any way by them. Those moneys form a statutory fund which only comes into existence when the company is in liquidation—that is to say, when the powers of the directors have ceased. But uncalled-up capital is in a totally different position. The liability to pay it up does not depend on the contingency of liquidation. The power to call it up can be exercised by the directors, and all money raiseable in respect of it is an asset of the company. When calls are made by directors it is the capital which they call up; and where calls are made by liquidators it is capital that they call up, so long as there is capital to call. In ordinary limited companies they can require payment of nothing else; in other companies they can; and it is unnecessary to distinguish the calls in respect of capital from calls in respect of further liability.

But the proposition that calls made by the liquidators of an ordinary limited company are not calls of capital, but of other moneys payable by statute, seems to me very paradoxical and to be a proposition which leads to the strange conclusion that members of such companies are under two liabilities, and not one—namely, a liability to pay up the capital, and another to pay up a sum equal to it, with, I suppose, a substitution of the latter liability for the former in the event of a winding-up. This view is, I think, erroneous, and the language of the *Companies Act*, 1879, to which I will refer presently, is inconsistent with it.

Webb v. *Whiffin* (1) appears to me to be rather in favour of than opposed to the view which I take of this matter. On a winding-up it is the liquidator's duty to get in and distribute the assets

(1) Law Rep. 5 H. L. 711.

of the company, including all uncalled-up capital, if it is required. But what are assets of the company which the liquidator can get in and distribute depends on what alienations, charges, or incumbrances have been validly made or created before the winding-up began. If the company has mortgaged or charged its property, or any debt due to it, or any money which, although not a debt, the directors had the power of requiring payment of, there is nothing in the statute which entitles the liquidator to disregard such mortgage or charge. Those who contend that the liquidator, although bound to regard mortgages of specific property and floating charges, is at liberty to disregard charges on uncalled-up capital, are bound to shew why these last charges are less valid than the first.

Reliance is placed on the statutory enactment prohibiting set-off and on the cases relating to that subject; and unquestionably there are passages in some of the judgments in those cases which, if taken as starting-points and made the basis of further reasoning, might lead to a conclusion different from that at which I have arrived. I allude more particularly to *Black & Co.'s Case* (1) and *In re Whitehouse & Co.* (2). But the proper starting-point is the statute itself. The exposition of it given in those and other cases is valuable; but it must never be overlooked that there is a section in the Act (sect. 101) expressly forbidding set-off in the winding-up of limited companies, and that this express prohibition is the basis of the reasoning in the cases in question.

In *In re Whitehouse & Co.* the late Master of the Rolls criticised the reasoning of the Court of Common Pleas in *Brighton Arcade Company* v. *Dowling* (3), on the ground that the Court there was wrong in treating a call made by the liquidator in a voluntary winding-up as a debt due to the company. But, with deference to Sir *George Jessel*, it appears to me that on this point he was himself mistaken. The decision in *Brighton Arcade Company* v. *Dowling* was, in my opinion, clearly erroneous, because, although the call was a debt due to the company, the statute, properly construed, prohibited the allowance of a set-off in cases of

(1) Law Rep. 8 Ch. 254. (2) 9 Ch. D. 595.
(3) Law Rep. 3 C. P. 175.

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voluntary winding-up, as well as in cases of winding-up by the Court or subject to its supervision.

I have thought it desirable to call attention to this matter, as, although the decision in *In re Whitehouse & Co.* (1) is, in my opinion, quite correct, some of the observations in it are, I think, themselves open to comment, and are opposed to conclusions at which I have myself arrived.

Having now dealt with the Act and the decisions most opposed to the validity of mortgages of uncalled capital, it is necessary to refer to the authorities in which such mortgages have been held valid. *In re Phœnix Bessemer Steel Company* (2), and *Howard* v. *Patent Ivory Manufacturing Company* (3) are distinct authorities in their favour. But there are many other cases in which the Courts have taken for granted that such mortgages would have been valid if the regulations of the company had authorized them in sufficiently plain language.

In re Sankey Brook Coal Company (4), *In re Colonial Trusts Corporation* (5), *Bank of South Australia* v. *Abrahams* (6), and *Stanley's Case* (7), paved the way for these by treating the question as one of construction only. Further, art. 7 of Table A, relating to the prepayment of uncalled capital, shews that uncalled-up capital may be anticipated, and the fund for distribution in the event of winding-up be thereby reduced. Members who prepay the amounts which may be called up on their shares are not liable to pay them up again in the event of a winding-up. This was decided in *Poole, Jackson, & Whyte's Case* (8), and that case goes far to shew that calls made by the liquidator in winding up a limited company are in respect of uncalled capital, and not in respect of a liability to contribute to some other fund.

The *Companies Act*, 1879, s. 5, enables a limited company to divide capital into two parts, one of which shall only be called up in the event of a winding-up. When the capital of the company has been so divided, that part which can only be called up in the event of a winding-up ceases to be subject to the control

(1) 9 Ch. D. 595.
(2) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(3) 38 Ch. D. 156.
(4) Law Rep. 9 Eq. 721; 10 Eq. 381.
(5) 15 Ch. D. 465.
(6) Law Rep. 6 P. C. 265.
(7) 4 D. J. & S. 407.
(8) 9 Ch. D. 322.

of the directors, and cannot, I apprehend, be charged or disposed of by them. Whether such part can be prepaid need not be discussed. The language of this enactment, however, again supports the view that calls made by the liquidator of an ordinary limited company in course of winding-up are made in respect of capital, and not in respect of some statutory fund more or less distinguishable from it.

The *Companies Clauses Consolidation Act*, 1845, expressly enables companies governed by that Act to mortgage unpaid-up capital. Such a mortgage would, I apprehend, prevail against a judgment creditor of the company who was proceeding by *scire facias* against a shareholder whose shares were not fully paid up; and such a mortgage would equally prevail against a liquidator making calls in winding up a company governed by the same Act and capable of being wound up under the *Companies Act*, 1862. This shews that there is nothing contrary to public policy in allowing companies with limited liability to mortgage their unpaid-up capital. It is true that there is no such express power given in the *Companies Act*, 1862; but this is accounted for by the fact that the Act in question leaves powers of mortgaging and other powers of directors to be regulated by the company's articles of association. The omission of express power to mortgage unpaid-up capital affords, therefore, no sufficient ground for negativing such power.

In conclusion, I can find nothing in the *Companies Act*, 1862, or subsequent Acts amending it, expressly or by necessary implication prohibiting a limited company from mortgaging its unpaid-up capital; nothing to shew error in the view hitherto taken and daily acted upon, and according to which such mortgages are valid even as against creditors in a winding-up; nothing which would justify the Court in holding the mortgages in this particular case invalid. Finding nothing to prohibit them and an article expressly authorizing them, I am of opinion that they are valid, and that the appeal ought to be dismissed with costs.

LOPES, L.J.:—

With regard to the main point raised in this case, namely, whether future calls can be mortgaged where such mortgage is

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authorized by the memorandum and articles of association, it is, to my mind, difficult to distinguish in principle this case from *Black & Co.'s Case* (1) and *In re Whitehouse & Co.* (2).

It is said that those decisions are based on a question of set-off, and are not applicable to the case of a mortgage of future calls. Lord Justice *Mellish* does, no doubt, base his judgment in *Black & Co.'s Case* on sect. 101 of the Act of 1862; but Lord *Selborne* does not, in my opinion, rest his judgment on that section, but rather on the ground that, when a winding-up comes, all the creditors are to be paid, and, in the first instance, *pari passu*.

Lord *Selborne*, in the most clear and comprehensive language, sums up his opinion at the end of his judgment thus (3): "I am clearly of opinion that it is not competent for any persons whatever, by any antecedent contract, to alter the administration of the assets of the company under such a winding-up"—that is, a winding-up under supervision or by the Court. "I am not at all sure that, on the construction of this particular contract, it is necessary to hold that there has been any attempt to do so; but even if there was an attempt, my judgment would be that that attempt is necessarily ineffectual, because it would be an attempt, by private agreement, to get out of and over-ride an Act of Parliament."

I cannot help thinking that Lord *Selborne*, when he used those words, intended to express an opinion that there could be no anticipation of future calls in any case so as to alter the administration of assets under a winding-up.

It is said that the Act of 1862 does not prohibit the pledging of future calls. This is true; but it does not authorize such a transaction, and you would expect to find such an authorization when it is recollected that the *Companies Act*, 1845, expressly confers power to mortgage future calls.

It has been argued that the anticipation of the fund, out of which the creditors are to be paid, before the fund is created is contrary to the policy of the Act and inexpedient. I feel there is great weight in that argument. But if the *Phœnix Bessemer*

(1) Law Rep. 8 Ch. 254. (2) 9 Ch. D. 595.
(3) Law Rep. 8 Ch. 264.

Case (1) and *Howard* v. *Patent Ivory Manufacturing Company* (2) are correctly decided, they cover the present case.

In the *Phœnix Bessemer Case* the point now raised was not argued. That case was decided in 1875, and *Black & Co.'s Case* (3) in 1872, and it is to be remarked that the latter case was not cited in the *Phœnix Bessemer Case*, nor was it cited in *Howard* v. *Patent Ivory Manufacturing Company*, which was decided in 1888. The late Master of the Rolls, in the *Phœnix Bessemer Case*, seems to have assumed the power to mortgage future calls, and to have given no reasons for that conclusion.

The *Phœnix Bessemer Case* has, no doubt, been acted upon for fifteen years, and, so far as I know, the authority of the decision has not been impugned.

I feel the weight of this, and I need scarcely say that I feel the weight of the judgments which have just been delivered by learned Judges more conversant with company law than I am, and of the reasons given in those judgments. I assent, therefore, to those judgments, but with great hesitation, for the reasons, amongst others, which I have given.

Solicitors: *Drake, Son, & Parton*; *Maples, Teesdale, & Co.*; *Lane, Monro, Soutter, & Slack*; *G. M. Clements.*

(1) 44 L. J. (Ch.) 683; 32 L. T. (N.S.) 854.
(2) 38 Ch. D. 156.
(3) Law Rep. 8 Ch. 254.

G. I. F. C.

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STIRLING, J.
Oct. 26, 29; *Dec.* 14.
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April 24, 25.]

In re JODRELL. JODRELL *v.* SEALE.

[1888 J. 341.]

Will—Construction—Gift to Persons named for Life and to their Children—Residuary Gift to "Relatives named" who are entitled to a "Transmissible Interest"—Wife's Nieces—Illegitimate Relatives.

A testator gave his general estate to his executors and directed them to set apart the sums specified for the benefit of certain persons by name, some of whom he described as his cousins and others as his nieces, during their respective lives, and after their deaths for their children; and he gave his residuary estate to be equally divided among such of "his relatives thereinbefore named" as by virtue of the provisions of his will should become entitled to a vested transmissible interest in any part of his property. The persons described as the testator's nieces were his wife's nieces, not his own; and some of the persons described as his cousins were illegitimate relatives:—

Held, by *Stirling*, J., that the words "a transmissible interest" meant an interest transmissible after death, and that those legatees who took only a life estate were excluded from participation in the residue:—

Held, by the Court of Appeal (reversing the decision of *Stirling*, J., upon these points), that upon the true construction of the will, the words "relatives named" included relatives by affinity as well as consanguinity, and illegitimate as well as legitimate relatives; and also persons described as children of legatees named in the will, although not themselves specially named.

Observations as to the province of authorities on questions of construction.

ADJOURNED SUMMONS.

The Rev. Sir *Edward Repps Jodrell*, Bart., who died on the 12th of November, 1882, by his will, made on the 23rd of March, 1868, appointed his wife and two friends whom he named to be his executors and trustees, and gave various specific legacies. By clause 6 of his will he bequeathed to his cousin, *Richard Jennings*, the marble bust of his grandfather, which stood in his study at No. 64, *Portland Place*, and at his decease he bequeathed the same to the person or persons who should then be or constitute his heir-at-law. By clause 12 he bequeathed to his cousin, the Rev. *Charles Phillip Paul Jodrell*, one of his single gold chains to be selected by his executors. By clause 14

the testator bequeathed his general estate to the executors and trustees, and after payment of debts, funeral and testamentary expenses and legacies, upon trust for the benefit of his wife during her life; and by clause 15 he desired the trustees, after his wife's death, to sell and convert all his stocks, funds, and securities into money, and "by and out of the proceeds thereof to set apart and pay the several legacies or sums of money specified in the twenty following paragraphs." There was a direction to marshal so that certain charitable legacies might be paid out of pure personalty.

By clause 16 there was a direction to the trustees to set apart the sum of £5000, and to divide the same amongst such one or more of the children of his late cousin, Major *Edward Jodrell*, other than his eldest son, whom he excluded because he was sufficiently provided for, as should be living at his wife's death, and as should have attained or should attain the age of twenty-one years, and if more than one in equal shares.

By clause 17 there was a gift in similar terms (and the same form of words was used in the following clause) and a direction to the trustees to set apart £5000, and to divide the same amongst such one or more of the children of his cousin, the Rev. *Henry Jodrell* (other than his eldest daughter, whom he excluded in consequence of the fortune derived by her through Admiral Sir *Charles Napier*), as should be living at his wife's death, and should attain twenty-one years of age. By clause 18 there was a direction to the executors to set apart and invest the sum of £5000, and to hold the same in trust to pay the income thereof to his cousin, *Mary Bishop*, for her separate use during her life, and without power of anticipation, and after her death in trust for such one or more of her children as should survive her and his said wife and should attain twenty-one years of age.

By clause 19 there was a similar direction to the trustees to set apart and invest the sum of £5000, and to hold the same in trust to pay half the income thereof to his said cousin, *Richard Jennings*, during his life, and to his wife, *Agnes Jennings*, after his death, during her life; and to pay the other half of such income to the said *Agnes Jennings* during her life, and to the said *Richard Jennings* after her death, during his life (all such

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payments to the said *Agnes Jennings* to be for her separate use, and without power of anticipation), and after the decease of the survivor of them in trust for such one or more of their children as should survive them and his said wife and attain twenty-one years of age.

By clause 20 the testator directed the trustees to set apart and invest the sum of £2000, and to hold the same in trust to pay the income to his cousin, *Louisa Buller* (wife of *James Buller*), for her separate use for her life, and without power of anticipation, and after her death in trust for *Charles Seale Hayne*, if he should survive the testator's said wife and the said *Louisa Buller*; but if he should not survive them both, the said sum of £2000 should sink into the residuary estate, and be disposed of accordingly.

By clause 21 the trustees were directed to set apart and invest the sum of £3000, and hold the same in trust for his niece, *Emily Higgins*, if she should survive his said wife and attain the age of twenty-one years; but if she should not do both, the said sum should sink into the residuary estate; and by clause 22 there was a similar direction to invest a sum of £2000, and to hold the same on trust to divide the same equally between his two nieces, *Mary Champagnè* and *Blanche Champagnè*, if they should survive his wife and attain the age of twenty-one years; but if both should die in the wife's lifetime and under twenty-one years, that sum also should sink into the residuary estate. By clause 23 the testator directed the trustees to invest the sum of £5000, and to hold the same in trust to pay the income to his cousin, Major *George King*, during his life, and after his death for his children as should survive him and the testator's wife and attain the age of twenty-one years.

By clause 24 there was a similar gift of £5000 to hold in trust to pay the income to his cousin, *Georgiana Forde*, for her separate use during her life, and after her death in trust for her children as should survive her and the testator's wife and attain the age of twenty-one years; and by clause 25 there was a like gift of £5000 to hold in trust to pay the income thereof to his cousin, *Emily MacDonnell*, for her separate use during her life, and after her death in trust for her children as should survive her and the testator's wife and attain the age of twenty-one years.

By clause 37 the testator gave as follows: "As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females for their separate use respectively, and without power of anticipation."

The testator by his first codicil, dated the 11th of March, 1871, made certain alterations in the dispositions contained in his will, and in particular he revoked clause 22 of his will and the bequest of £2000 therein contained in favour of his nieces, *Mary Champagnè* and *Blanche Champagnè*, and directed that such bequest should form part of the residue disposed of by the 37th clause of his will.

By the 5th codicil, dated the 26th of July, 1882, the testator revoked the appointment of executors and trustees contained in his will, and appointed his wife, *Alfred Jodrell*, and *Richard Edward Jennings*, executors and trustees, and also appointed other persons to be executors and trustees in the respective places of *Alfred Jodrell* and *Richard Edward Jennings*, if either should die before him (the testator) or decline to act.

By clause 7 the testator revoked the 21st clause of his will as to the sum of £3000 bequeathed to or in trust for his niece, *Emily Higgins*, then Mrs. *Churchill*, and directed that the said £3000 should fall into and be applied as part of his residuary estate, and should be invested accordingly, and the dividends and income arising from such investment should be paid to his wife during her life. By clause 10 of the same codicil the testator said: "Whereas I have by the 6th clause of the said 1st codicil to my will revoked the bequest of £2000 to or in favour of my nieces, *Mary Champagnè* (now *Mary Phillips*, the wife of Colonel *Phillips* of the 4th Hussars) and *Blanche Champagnè*; and by the 7th clause of this codicil I have revoked the bequest of £3000 to or in favour of my niece *Emily Higgins* (now Mrs. *Churchill*); now, I hereby direct and declare it to be my intention that neither of my above-named three nieces shall be entitled to participate in the division of my residuary estate, as directed by

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the 37th clause of my will; and I hereby expressly exclude them from coming under the provisions of such clause."

The testator's widow died on the 1st of March, 1888.

In an administration action commenced by originating summons on the 13th of March, 1888, in which the executors, Sir *Alfred Jodrell* and *Richard Edward Jennings* were Plaintiffs, and *Adela Seale*, the wife of *John Henry Seale*, and *Mary Anne Ind*, the wife of *Frederick John Nash Ind*, two of the daughters of Major *Edward Jodrell*, were Defendants, certain inquiries were directed to be made; and the Chief Clerk, on the 15th of March, 1889, certified that the widow died on the 1st of March, 1888, and that *Amelia Vertue Higgins*, formerly *Jodrell*, was at the time of her death in possession, as tenant for life, of the *Jodrell* family estates, described by the testator as "my family estates," and was sole next of kin and heiress-at-law of the testator, and was still living; and that the Plaintiff, Sir *Alfred Jodrell*, was the legal personal representative of the testator's widow. He also certified that the persons named in clauses 23, 24, and 25 were not legitimately related to the testator, but were the legitimate descendants of *George Morison King* and *Mary Margaret Morison Moylan*, formerly *King*, both of whom and the testator's mother were the natural children of *Caroline Amelia Morison*. He also certified that the Rev. *Charles Phillip Paul Jodrell* died in October, 1875, in the lifetime of the testator; and that Major *Edward Jodrell* died in January, 1868, leaving, other than an eldest son, who died in March, 1882, three children, the Defendant *Adela*, the wife of *John Henry Seale*, the Defendant *Mary Ann*, the wife of *Frederick John Nash Ind*, and the Plaintiff, Sir *Alfred Jodrell*, now the eldest and only surviving son of Major *Edward Jodrell*, and that all were now living; that the Rev. *Henry Jodrell*, the cousin mentioned in clause 17 of the will, was living, and four children other than an eldest daughter were living; that *Mary Bishop*, mentioned in clause 18, died in 1875, in the testator's lifetime, and that her only child was living; that *Richard Jennings*, mentioned in clause 19, survived his wife, and died in 1874, leaving five children, *Richard Edward Jennings*, a Plaintiff, being one of them, and all were now living; that *Louisa Buller*, mentioned in clause 20 of the will, died in the testator's lifetime,

leaving *Charles Seale Hayne*, her son, and a first cousin of the testator, once removed, and that he was now living; that Major *George King*, mentioned in clause 23, died in 1877, leaving four children, all now living; that Mrs. *Forde*, mentioned in clause 24, died in 1887, in the lifetime of the testator's widow, and left three children, who were all living; and that *Emily MacDonnell*, mentioned in clause 25, died in 1883, leaving five children, and all were now living.

The summons was adjourned into Court, and came on for hearing before Mr. Justice *Stirling* on the 26th of October, 1889.

C. Lyttelton Chubb, for the Plaintiffs, the executors and trustees, stated the facts, and said that questions had arisen as to whether persons named in the will as "my cousins," but who were not cousins legally, could take under the residuary clause as "relatives"; as to whether the words "hereinbefore named" limited the gift of residue to persons who were named, or whether their children, and who were referred to as such, could take; as to what the words "vested transmissible interest" meant; and whether the children, if entitled, took *per stirpes* or *per capita*.

Rigby, Q.C., (*Christopher James*, with him), for *Charles Seale Hayne*:—

He is one of the persons named in the will, and there is nothing which makes the gift to him uncertain. His title is under the bequest to Mrs. *Buller*, a first cousin of the testator; her first husband was Mr. *Seale Hayne*, and Mr. *Charles Seale Hayne* is their only son. The Chief Clerk has certified that he is one of the relatives of the testator. No question can be raised as to the bequest of the £2000 to Mrs. *Buller* for life, and after her death to Mr. *Charles Seale Hayne*. He has survived his mother and the testator, and he became entitled to a vested transmissible interest, so that in all respects he fully answers the description given in the residuary clause, and he, I submit, will take the whole of the residue, both real and personal. The Rev. *Charles Phillip Paul Jodrell*, named in clause 12 of the will, died in the testator's lifetime, and he therefore is excluded, and so are all those named as tenants for life, as they had and have not a

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transmissible interest. The words "my relatives hereinbefore named" must be construed strictly and literally with the following words, "shall become entitled to a vested transmissible interest." The words do not mean, "mentioned, referred to, or described," but to have a name in ordinary language: *In re Holmes* (1). That case is in favour of Mr. *Charles Seale Hayne's* claim, and the decision in the case of *Bromley* v. *Wright* (2), to which reference may be made, is no authority against it. The gifts in the other clauses of the will are to children of the parents who were named, and who did not take a transmissible interest. The word "children" used in a will, *primâ facie* means legitimate children: *Hill* v. *Crook* (3); but that case has really nothing to do with the present, in which the word is used generally. The testator knew the fact that his own mother was a natural child, and that the persons called "cousins" in clauses 23, 24, and 25 were not in law relatives, but in blood merely. Though designated they were not "hereinbefore-named" relatives. Other cases, such as *Dorin* v. *Dorin* (4); *Smith* v. *Lidiard* (5); *In re Brown* (6); *Bagley* v. *Mollard* (7); *Megson* v. *Hindle* (8); *In re Humphries* (9); *In re Bryon* (10), and *In re Hall* (11), may also be referred to. According to those decisions, the testator did not do sufficient to include the children, who were not named as relatives, but as the children of parents whom he called "my cousins," persons who were cousins in a sense, but not in a legal sense, in the residuary clause. The testator intended to exclude all persons who might become "entitled," but who might not have a vested "transmissible interest"; and consequently all those persons who had or have life interests merely are excluded from any benefit in the residue; and the same contention applies to Mr. *Richard Jennings'* children, who have not a vested interest. Mr. *Charles Seale Hayne*, having survived his mother and the testator's widow, is within the description of being "entitled to a vested transmissible interest"; he alone has become entitled, as I submit, to the

(1) 1 Drew. 321.
(2) 7 Hare, 334.
(3) Law Rep. 6 H. L. 265.
(4) Ibid. 7 H. L. 568.
(5) 3 K. & J. 252.
(6) 37 W. R. 472.
(7) 1 Russ. & My. 581.
(8) 15 Ch. D. 198.
(9) 24 Ch. D. 691.
(10) 30 Ch. D. 110.
(11) 35 Ch. D. 551.

whole of the residue. The plan of disposition in the residuary clause, curious though it may be considered, which the testator adopted, excludes all others, because they have not a vested transmissible interest and do not bring themselves within the description therein.

Sir *Henry James*, Q.C., *Renshaw*, Q.C., and *Ingle Joyce*, for the Defendants, two of the children of Major *Edward Jodrell*, and the children of the Rev. *Henry Jodrell*:—

The contention has been that Mr. *Charles Seale Hayne* is entitled to the whole of the residue, to whose mother the income of £2000 only was given for life, and yet if he did not survive her and the testator's widow, it was to fall into the residue, and there would have been an intestacy. That was a clumsy way in which to give the residuary estate, not to a class but to one individual, and to whom no reference was made that he was a relative. The testator gave bequests to the children of persons named, and that was a sufficient designation. It cannot be necessary that the Christian and surnames should be repeated. There is an ample designation in this will as to who were to be the recipients of the testator's residuary estate. If the testator had intended that Mr. *Charles Seale Hayne* should take the whole of it, he would have said so in plain language—and that he has not done. The decision in *Bromley* v. *Wright* (1) is in favour of the children of legitimate cousins taking a share of the residue. The mere fact that the testator in his will treated persons who were the children of illegitimate children as his cousins is not sufficient in law to entitle persons who were not really his relatives to take a share. The two defendants, and the other children for whom we appear, will be, as submitted, entitled to take shares, and not the children of illegitimate children.

Beale, Q.C. (*Trevelyan*, with him), for Mrs. *Worsley*, the only child of Mrs. *Bishop*:—

Mr. *Charles Seale Hayne* does not take the whole of the residue. It is clear that the testator contemplated in clause 37 a division of the residue; and it should be *per stirpes*, and not *per capita*,

(1) 7 Hare, 334.

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the gift being to children of families: *Brett* v. *Horton* (1); *In re Campbell's Trusts* (2). [As to the time of vesting and distribution and who were excluded, the cases of *Matthews* v. *Paul* (3), and *Domvile* v. *Winnington* (4), and *Livesey* v. *Livesey* (5) were referred to.]

Farwell, for Sir *Alfred Jodrell*:—

He is entitled to a share of the residue. This is not a case of a testator being in *loco parentis*, and of a parent making a provision for his younger children. The principle in such cases does not apply to cousins. The true view as to an eldest son will be found in *Jarman* on Wills (6); an "eldest son" means *primâ facie* "first-born son": *Meredith* v. *Treffry* (7); and the decision in *In re Whorwood* (8) is applicable. The eldest son in clause 16 does not mean eldest son for the time being. The 5th codicil did not bring down the date of the will for all purposes: *Hopwood* v. *Hopwood* (9). The exclusion of the eldest son is not applicable to Sir *Alfred*.

Hastings, Q.C., and *Swinfen Eady*, for *Richard Jennings* and his children, all of whom had attained the age of twenty-one years before the testator's death:—

Richard Jennings is one of the persons referred to in clause 37, and who, "by virtue of the trusts and provisions" thereinbefore named, is entitled to a part of the testator's residuary property. *Richard Jennings* was a relative in the legal sense of the word. He was also "named." The subsequent words merely indicated the mode in which the gift would go over: *Lady Lincoln* v. *Pelham* (10). "Transmissibility" is not confined to the life of the first beneficiary. There was an intention shewn that all should take a vested interest, and it was vested and transmissible. The father and children make up the objects of the particular legacy; and in any case where the parent is dead the children alone are the objects of the gift. Why should it be held that, because *Richards Jennings*

(1) 4 Beav. 239.
(2) 33 Ch. D. 98.
(3) 3 Sw. 328.
(4) 26 Ch. D. 382.
(5) 2 H. L. C. 419.
(6) 4th Ed., vol. ii., p. 213.
(7) 12 Ch. D. 170.
(8) 34 Ch. D. 446.
(9) 7 H. L. C. 728.
(10) 10 Ves. 166, 173-175.

takes an interest for life in a certain sum and his children after him, that he is not entitled to a share of the residue?

The testator made his intention clear by the codicils as to the persons who should take the residue. He spoke of a division of it. It was attributing to the testator a grotesque meaning to say that he never intended the children to take a part of the residue, but that he meant only Mr. *Charles Seale Hayne* to take it all. Had that been the intention of the testator, he would not have used the word "division." Why were the children not named? A gift to the children of *A. B.* was as good as naming them, and the surname "*Jennings*" was quite enough. "Named" cannot mean in this case "*nominatim.*" All the classes of children were named. There is enough in the will to shew that the children of *Richard Jennings*, if they survive him, come within the terms of the clause, and that they will be entitled to a vested transmissible interest and to a share of the residue.

Levett, for the sister of the testator and sole next of kin and heiress-at-law:—

I submit that, if the testator had put in her name, she would have been within the terms of the will. "Named" means only "named" by reference, and not specifically. The sister was a relative named by reference; but if the gift was not stated with sufficient clearness, then there was an intestacy, and the residue will go to the next of kin and heiress-at-law, and I ask the Court to hold that there is an intestacy.

Sir *Horace Davey*, Q.C. (*Rashleigh*, with him), for the family of Major *George King*, all of whom had attained twenty-one years:—

I contend that they are entitled to participate in the residue. The word "named" means named by Christian and surname, and by description also. The designation is sufficient of *John Thomas's* son. The will must be read so as to give effect to the intention as far as possible. The word "named" is capable of being construed as "named by reference." A "vested transmissible interest" does not, I agree, include the tenants for life; but "relatives hereinbefore named" include all whom the testator

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described as his relatives, and all those who were blood relations. "Relatives hereinbefore named" include all who were previously named in the will; the phrase includes persons who were named by reference and by description; and the children of Major *George King* are entitled to a vested transmissible interest. The testator gave legacies to persons whom he described as his cousins and relatives, and then he gave the residue in terms which were equivalent to "my said relatives." It is easy to gather from the will that the testator intended to include relatives who were in blood relatives, and the decision in *Smith* v. *Lillard* (1) applies in favour of these children. The sound rule to be derived from the cases is in *Hill* v. *Crook* (2), that, *primâ facie*, the word relative or child means a person who really comes within the description; but a testator may in the context shew that he intended to include persons who come within the natural description, although not legally relatives. Can the Court find sufficient in the context to shew that the testator intended to include the cousins who were children of those persons who were illegitimate? I submit that it can. If the testator intended to give everything to Mr. *Charles Seale Hayne*, he went a very roundabout way to do it. He said, "my relatives hereinbefore named" or described. These children were described by reference to their father, who was named as a cousin and was a blood relation. It is a question of intention as to who were included in the word "relatives": *Owen* v. *Bryant* (3); and here so much depends upon the context. "Named" means primarily designated by name; but a person described as So-and-so's son is "named." I submit that the children of Major *George King*, who died in the testator's lifetime, fulfil all the requisites: that they are relatives, are "named" within the meaning of the clauses, and that they take a vested transmissible interest.

Fischer, Q.C., and *Hadley*, for the children of Mrs. *Forde* and Mrs. *MacDonnell*, and for trustees:—

The testator, who had no children, knew the state of his

(1) 3 K. & J. 252. (2) Law Rep. 6 H. L. 265.
(3) 2 D. M. & G. 697.

family—that he had relatives paternal and maternal. The children were "named," and were, upon the literal construction of the words of the will, sufficiently indicated.

The object of the residuary clause was to give additional legacies to the persons who became entitled under the earlier clauses of the will—to benefit, in fact, not only the individuals who were named, but their children after them. The children as well as the parents were entitled to the additional sums, and the former took a vested and transmissible interest.

[They referred to the cases of *Evans* v. *Davies* (1) and *Shelley* v. *Bryer* (2).]

Rigby, in reply:—

The words "hereinbefore named" were used in a primary, and not in a secondary sense. If a secondary meaning should be given to them, the other words must be struck out altogether. I stand upon the primary meaning, and there is no doubt what the words mean.

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1889. Dec. 14. STIRLING, J.:—

The question raised by this summons is, who are entitled to the residuary estate of the testator, the Rev. Sir *Edward Repps Jodrell*, Bart., under clause 37 of his will, dated the 23rd of March, 1868. [His Lordship having read that, and other clauses of the will and codicils, continued:—]

The testator's residuary estate is very large, amounting, as was stated, to about £250,000.

Among the persons designated by the testator as his relatives were not only persons who were legally his relatives, but also some who were not such by law, being descendants of two persons, who, along with the testator's mother, were the natural children of *Caroline Amelia Morison*.

It was conceded in argument that the testator was aware of the true state of the case as regarded the last-mentioned persons. Under the circumstances various questions were raised as to the meaning of several of the expressions which occur in the 37th clause of the will. First, a question was raised as to the

(1) 7 Hare, 498. (2) Jac. 207.

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meaning of the word "transmissible." I think it means "capable of transmission after death." No clearer illustration of the meaning of the word could be found than in the language of Lord *Eldon* in the case of *Nannock* v. *Horton* (1), where (2) he spoke of an annuity not being transmissible, but ceasing with the annuitant. It follows that all persons who under the trusts and provisions of the will took merely life interests are excluded from participation in the residue.

The main question then arises as to the meaning of the words "relatives hereinbefore named"; and as to that three views have been put forward. The first rests on two elementary rules of construction, viz., that a will is so to be construed as to give effect to each word rather than in a way which will leave some of them inoperative; and that words are to be taken in their strict and accurate meaning, unless an intention can be inferred to use them in another. The strict and accurate meaning of the word "relatives" is "legitimate relatives." The strict and accurate meaning of the word "named" is stated by the late Vice-Chancellor *Kindersley*, in the case of *In re Holmes* (3), where he said (4) the meaning is "persons mentioned *nominatim*, if not by all their names, by some at least, either their Christian or their surnames." If the testator used the words "relatives" and "named" with those meanings, it is found that the class of persons who would have taken under clause 37, if the testator had died immediately after the execution of his will, consisted of, at most, five persons, viz., *Charles Phillip Paul Jodrell*, named in clause 12; *Charles Seale Hayne*, named in clause 20; *Emily Higgins*, named in clause 21; and *Mary Champagnè* and *Blanche Champagnè*, named in clause 22. Three of them are females, to whom the directions as to separate use and restraint on anticipation in clause 37 are applicable. Every word in the clause has effect given to it. What is there against that construction? First, it was said, and with some force, that if that was the testator's meaning he had adopted a very circuitous mode of designating those five persons. Secondly, it was pointed out that of those five persons *Charles Phillip Paul Jodrell* died in 1875, prior to

(1) 7 Ves. 391.
(2) Ibid. 402.
(3) 1 Drew. 321.
(4) Ibid. 323.

the date of the 5th codicil; that the legacies to the Misses *Champagnè* were revoked by the 1st codicil; and that given to Miss *Higgins* was revoked by the 5th codicil; so that the class of persons to take was reduced to one, viz., *Charles Seale Hayne*; yet the testator in the 5th codicil spoke of the "division" of his residuary estate under the 37th clause—a term which naturally imports participation by several. The weight of that observation appears to me to be diminished by the circumstance that in truth that clause of the 5th codicil is superfluous, and appears to have been inserted *ex majori cautelâ*, for the only trusts and provisions contained in the will under which the Misses *Champagnè* and Miss *Higgins* took any benefit were those relating to the revoked legacies, and the revocation was sufficient without the insertion of clause 10 of the codicil to deprive them of their transmissible interests in any part of the testator's property, and so to exclude them from participation under clause 37 of the will. The use of the word "division" in clause 10 of the 5th codicil may be attributable to the like caution on the part of the testator.

Next, on behalf of the legitimate relatives of the testator, it was contended that the word named was used in the secondary sense of "mentioned" or "referred to." That construction renders the word inoperative; for if that be its true meaning the clause would have precisely the same effect if the words "hereinbefore named" were omitted. In support of that contention, the case of *Bromley* v. *Wright* (1) was cited. That was, however, a decision on somewhat different words, and the learned Vice-Chancellor does not appear to me to lay down as a general rule that the words "hereinbefore named" are to be disregarded. Lastly, on behalf of the persons who, though not in law relatives of the testator, nevertheless appear to have been recognised by him as such, it was contended that the words "hereinbefore named" pointed in some way or another to such recognition. It is, however, to be observed that the persons who, not being legal relatives of the testator, are themselves recognised as such, do not take vested transmissible interests in the testator's property, and that such interests are given to the children of those persons, so that in order that that construction may be effectual

(1) 7 Hare, 334.

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on behalf of those in whose interest it was put forward, it is necessary to read the words "relatives hereinbefore mentioned," as having some such meaning as follows: "Persons who, if the statements as to relationship hereinbefore contained were well founded, would be relatives of mine." This construction does give effect to the words "hereinbefore named"; but, on the other hand, it seems to me to import into them a very great deal more than the testator has actually expressed. Now the clause in question is one which contains a somewhat unusual disposition of residue. The will bears marks of having been framed, not by the testator himself, but by some legal adviser; and on the whole I come to the conclusion that, in construing it, it is best to adhere as closely as may be to the actual language of the testator, and I therefore adopt that construction which gives effect to every word in the clause and attaches to each word its strict and accurate meaning. The result is that in the events which have happened Mr. *Charles Seale Hayne* is entitled to the whole of the residue.

T. F. M.

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From this decision several of the legatees who had been excluded appealed.

There was no appeal on the decision so far as it respected the interpretation of the words "transmissible interest."

The appeal was heard on the 24th of April, 1890.

Romer, Q.C., *Moulton*, Q.C., and *Trevelyan*, appeared for children of Major *Edward Jodrell* and the Rev. *Henry Jodrell*, and for the daughter of Mrs. *Bishop*.

Crackanthorpe, Q.C., and *Hadley*, for the children of Mrs. *Forde* and Mrs. *MacDonnell*.

Sir *Horace Davey*, Q.C., and *Rashleigh*, for the children of Major *King*.

Vaughan Hawkins, and *Swinfen Eady*, for one of the children of the Rev. *H. Jodrell*.

Rigby, Q.C., and *Christopher James*, for the Respondent, *C. S. Hayne*.

C. Lyttelton Chubb, for the executors and trustees.

LORD HALSBURY, L.C.:—

I am called upon to express an opinion on what is the meaning of this written instrument, and I repudiate entirely the notion of laying down any canon of construction which is to extend beyond the particular instrument that I am called upon to give an interpretation to. I do not know what the testator meant except by the words that he has used. I do not know that the law affords any presumption whether a testator intends to benefit those who are related to himself in the strict sense, or related to his wife. I do not know that the law presumes that he means to make a provision for those in respect of whom it may be said they are connected by blood, although not in every link of the pedigree, by wedlock. The law makes no presumption, I believe, upon the subject; and it would be very strange if it did, because the law will allow you if you choose, expressly and in terms, to leave things to your wife's relations, or to leave things to persons who are not your legitimate descendants; and, inasmuch as the law permits both those things to be done expressly, I myself am wholly unable to understand in what way a Court of construction is called upon to put particular interpretations upon particular words with reference to any supposed presumption that the law makes either way. For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, and not to part of it; and, having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments—and to that extent it may be said that they are canons of construction. But the moment I depart from those general canons of construction applicable to all instruments, and I am overwhelmed with authorities about what particular Judges have thought about other particular instruments, and whether in this or that particular instrument the Judge has been sufficiently satisfied that such and such was the meaning of the testator, I confess myself to be in a hopeless state of confusion. In the first place, I do not know what

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mental thermometer there is to ascertain what exact degree of certainty is to be obtained. If there is sufficient to establish the meaning, why is it sufficient? And what does that mean? It must mean sufficient in the mind of the particular tribunal that has to decide. That there are particular phrases and particular sets of phrases to which the law would attach a particular meaning is true; and when unqualified and unexplained by anything else those words are found in an instrument, of course you must give to those words or to those phrases the meaning which the law has attached to them, and it would be unreasonable if you did not; because you must suppose, in the absence of any other explanation, that the person who has used those phrases, or used the particular word, has used the phrase or the word in the sense which has hitherto been attached to it by the law, and there is no reason to go out of what you might call the ordinary and *primâ facie* meaning of such an expression.

But now I come to construe the particular instrument, and I do not desire to express my meaning otherwise than to use the language of Lord *Cairns* in *Hill* v. *Crook* (1), and he says, very truly, I think, "If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms that he has used, that is all which the law, as I understand the cases, requires." It seems to me that that is a very simple test, and, adding only to that the circumstances of the case with which the testator was dealing in order that you may put yourself as much as you can into the position, and diving so into the mind of the person who has made the instrument which you are endeavouring to construe, it appears to me you have all the legitimate materials from which you can deduce what was the meaning of the testator.

Now, applying to the present case those general observations which are applicable to the interpretation of all such instruments, I find that the testator has described a number of persons as his cousins. I do not think the particular word which we have here to construe—the word "relative"—occurs in any earlier part of the instrument than in that residuary clause which we are called upon to construe, and when we do come to

(1) Law Rep. 6 H. L. 265, 285.

the word "relative" in the 37th section we must find out what the testator has meant by the word "relative."

Now, the first observation that strikes one is that he has described, according to the statement in the residuary gift (I use for the moment the word "described," leaving out for the moment the word "named," which requires separate treatment)—he has described as relatives a number of persons in respect of whom his view is that by the provisions that he has made some of them may become entitled to "a vested transmissible interest" in some part of his property "by virtue of the trusts or provisions hereinbefore contained." I find, therefore, that that is the first guide to the interpretation which I am called upon to make; and I find, therefore, that the word "relative" is used as a general word applicable to some of the persons whom he has hereinbefore described.

Now, with reference to Major *King*, *Georgiana Forde*, and to *Emily MacDonnell*, this observation applies—I take those as examples, though I believe there are more—those are persons who are not cousins in the strict sense which is insisted on on the other side. They are persons, all three of them, with respect to whom the bar sinister would prevent the actual application in strictness of that language.

Then did he mean that they were to be persons who were to come within that other description—that they were persons who might become entitled to a vested transmissible interest in any part of his property? With respect to Major *King*, the provision is that after his death there should be a trust for his children as shall survive him and the testator's wife, and shall have attained or shall attain the age of twenty-one years. And I think that *formula* is repeated with respect to each of them. Did he mean those persons when he spoke of his "relatives"? I confess for myself I cannot entertain the smallest doubt that they were in his mind as relatives. The whole framework of the will, looking at it (I say nothing for the moment about the codicil), seems to me to point in that direction, and that direction only; and, without repeating the same class of observations, I may say the same about those persons who are described as his nieces. He has, therefore, to

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use the language of Lord *Cairns*, given me a dictionary whereby I find that his wife's relatives, the nieces, and his illegitimate cousins are his relatives. Under those circumstances, I am in a position to construe what he meant when I refer to the 37th section and find that he says that he directs his real and personal estate not effectually disposed of "to be equally divided amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females, for their separate use respectively, and without power of anticipation."

Now, so far I have been able to explain the will satisfactorily to my own mind, and having regard also to the fact that the Misses *Champagnè* are referred to in the 10th section of the 5th codicil, to which I will refer for another purpose presently, there seems to me to be no question of doubt at all.

Then, having satisfied myself that the testator used the word "relative" in the extended sense to include the wife's relations and those who are related in the way I have pointed out, I come to the next question, whether it was only those persons whose Christian names and surnames were inserted that he referred to, and that depends upon the true construction to be given to the words "hereinbefore named." I confess that I have been a little puzzled to know in what way this will was to be construed if that strict construction of the word "named" was to be given. Remembering that the will and the codicil are to be read together, I really do not know in what way more than one of the provisions of this will could be given effect to. But when I come to see what the effect of the opposite construction is, I find that the 37th section contemplates the division "equally amongst such of my relatives hereinbefore named as by virtue of the trusts and provisions," and so forth, and I find that at the date of the codicil there was only one person who had satisfied the description, if we adopt the limitation upon the language used by the testator that is insisted upon on the other side; and therefore it seems to me that not only must we assume the testator not to have known the meaning of the particular words that he was employing, but we must assume that, although he knew, as he

must have known, the position of his family, he reiterated the direction that the residuary estate was to be divided with all this particularity among such of his "relatives hereinbefore named," and so on, at a time when he must perfectly well have known that there was but one single person who could have satisfied that description.

Now, is it reasonable in construing the whole of an instrument, and looking to the state of the mind of the testator at that time, and assuming him to be aware of the meaning which he had himself previously attached to the language which he had used, and to the fact that he contemplated at that time a division, and a proportionate division, which was impossible in the events that had happened, to give such a construction to this instrument as, it appears to me, if I were to give it, would completely frustrate the intentions of the testator as exhibited by the language which he himself has used, and by reason of some supposed overwhelming necessity to attach a peculiar technical meaning to words which it is not denied under some circumstances and with a sufficient context may bear a meaning which will give full effect to every part of the testator's complete testamentary disposition?

Under those circumstances I cannot entertain a doubt that we ought not to follow the decision of the learned Judge below. I think that the decision was erroneous and must be reversed.

We are also of opinion that the legatees are to take *per capita* and not *per stirpes*.

LINDLEY, L.J.:—

This will is long, and is made longer by the addition of five codicils, but if one addresses one's mind to the will for the purpose of ascertaining the intention of the testator from the language which he has used in the will and the codicils it is not difficult to arrive at a proper conclusion. In truth, in this case, as in many others, the difficulty arises when you look away from the document which you have to construe—when you look into cases (that is to say) which have been decided on other documents more or less like the one before you. I do not propose to deal with decided cases at all. It may be that there were expressions in the documents then before the Court which made the Judges

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come to conclusions which I cannot arrive at when I come to look at the will and codicils with which I have to deal. I do not consider that a decision which is more or less at variance with other cases is wrong because it is so at variance. Cases of construction are useful when they lay down canons or rules of construction, and they are useful when they put an interpretation on common forms—whether in deeds, wills, or mercantile documents. They may be valuable guides; but when I am told that because something occurs in one will I am to give a precisely similar effect to a similar expression occurring in another will dealing with a different property and in another context, I object altogether to do it. The only principle that I know of is that which has been expressed before. Look at the words, avail yourself of such evidence as is legitimately admissible, and see what the testator has said, and expound it as best you can with reference to what is legitimately before you. Now we have to consider what the real meaning is of the 37th clause of this will. In order to do that you must look far beyond clause 37. You must look at the whole will and all the codicils too; and when you look at the whole will you see this. First of all, the testator gives certain small legacies—some to persons who are relatives, some to servants and others who are not. Then he creates a trust fund which consists of the bulk of his property. He vests that in trustees, and he tells the trustees what they are to do. He subdivides it into sums of considerable amount, £5000, £5000, £2000, and so on, and he gives those sums, or tells the trustees to hold those sums in trust for persons whom he describes as his "cousins," as his "nieces," as "children of his cousins," and "children of his nieces." I do not think any other word of relation is used. Then he says, by clause 37, "As to all the residue and remainder of my real and personal estate not hereby effectually disposed of, I direct the same to be equally divided amongst such of my relatives hereinbefore named, as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property, and as to such of them as are females to their separate use respectively without power of anticipation." What does he mean by that? He has not said that the rest of his property is to be equally divided

amongst his relatives. He has said nothing of the sort. If he had, a difficulty would arise which would be a formidable one; but it is "my relatives hereinbefore named," and I cannot agree at all with the construction which was put upon this will giving no meaning to those words "hereinbefore named." On the contrary, those words appear to be the key to the whole meaning. When we bear in mind that in point of fact some of the persons called cousins were not cousins (some of them were of illegitimate descent), when we bear in mind that some of the persons he calls "my nieces" were not his nieces (they were his wife's nieces), the importance and the necessity of introducing some such expression as "hereinbefore named" becomes apparent, and it becomes obvious that we cannot, without doing violence to the language, treat those words as superfluous. In other words, we cannot treat the expression, "my relatives hereinbefore named" as equivalent to "my relatives." You must look at whom he has heretofore named as relatives. Now he has referred to them as relatives in two ways. He has referred to some of them by their names; he has referred to others of them in this way—he has called them children of persons whose names he gives.

Are not the persons referred to as children of persons whose names he gives "hereinbefore named" within the true meaning of this clause? You may name a class, you may name a person by calling him the son of his father just as well as calling him *John Thomas*; and to say that this expression "relatives hereinbefore named" excludes all those relatives who are before referred to as children of persons named would lead to a conclusion which appears to me to be entirely contrary to his manifest intention. I arrive at that conclusion by looking out of the will into the 5th codicil. At the date of the 5th codicil, if the construction put upon this will by Mr. Justice *Stirling* is right, the only person who could take the residue was *Charles Seale Hayne*.

Now, when the testator made his 5th codicil he excluded from the persons amongst whom the residue was to be divided three persons called nieces in his will; and having excluded those, there is only one, according to Mr. Justice *Stirling*, who can take his residue. But by the 5th codicil he confirms his will. What does that mean? It means he repeats at the date of his 5th

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codicil that his residue is to be divided amongst a class of people. How is that language apt to a state of things when the whole property goes to one? There being an alternative construction which will let in several people whom he has already called or designated as the children of relatives and treated as relatives, is it consistent with the language of his 5th codicil, when he again directs his residue to be divided amongst those persons, to exclude the whole of them, and to give the whole of the property to one person? That conclusion appears to me to be so startling, and so at variance with what he has said in his 5th codicil, that I unhesitatingly reject it. That leaves us in this position, that he means by the 37th clause of his will to include and not to exclude those relatives whom he has named by referring to them as a class, and it appears to me that that is the true view and the true construction of this will.

The case does not stop there, because he goes on—"such of my relatives hereinbefore named as by virtue of the trusts and provisions hereinbefore contained shall become entitled to a vested transmissible interest in any part of my property." That language is perfectly applicable to these children. They are all described as children who shall attain twenty-one, and shall survive his wife (I think that occurs in all). I do not say that that is conclusive, because the same words are applicable to some of the persons named—not as to all, but as to some. Then it goes on—"as to such as are females."

Mr. *Rigby* relies upon the word "are." It seems to me the true answer to that is to be found in the clause. Recollect, the clause is a direction to the trustees. It says in substance, the trustees are to divide the residue "amongst such of my relatives," and so on, "and such as are females to their separate use." What does that mean? What does the expression "are" refer to? Does it mean when he makes his will? Obviously not. Does it mean when he dies? No. Does it mean when the division has to be made? It appears to me, obviously, yes; and it is not doing violence to the word "are" to say what he means is, You are to divide my property among certain persons; and "to such as are females"; that is, those whom you then find to be females. That appears to me, I confess, to be the true

construction of this will, and I cannot myself entertain any doubt about it until I confuse myself by looking at other decisions. That I decline to do.

Therefore it seems to me that we should, if the Lord Chancellor and my Brother *Bowen* acquiesce, make a declaration to this effect: Declare, that according to the true interpretation of the testator's will and codicils the testator's residuary estate has become divisible *per capita* between such persons and children of persons mentioned or referred to by the testator as were or are referred to by him as his "relatives," and as survive his widow and as have attained or shall attain twenty-one. Then we must add this—with the exception of the persons expressly excluded by his will. Some are expressly excluded, and of course they cannot take.

BOWEN, L.J.:—

I am of the same opinion, and should add nothing at all to what has been said by the Lord Chancellor and Lord Justice *Lindley*, except that, as we are overruling the judgment of a very experienced Judge, it is rather more respectful to him that I should add a few words embodying my own judgment; but they will be based exactly upon the lines which have been laid down in the judgment of those members of the Court who have preceded me. It seems to me, as it seems to them, that all we have to do is to take the words of the will and the codicil, and to examine them by the light of such evidence as is admissible in these cases, and when we have examined the will and the codicil by the light of that evidence, to arrive at the conclusion as to what the testator's meaning is as expressed by him in his will.

In this particular case the words which we have had to construe in the 37th clause of his will—the words "relatives hereinbefore named"—are words which receive as it seems to me a construction partly from the will itself, and partly from the 5th codicil, which renders, I think, one, and only one, interpretation a reasonable one. You cannot put a reasonable interpretation upon the codicil unless you assume that by the words "hereinbefore named" in the will the testator intended, not merely such persons as were named by name, but such of his relatives as he

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had indicated before in the will as "relatives," and by a term appropriate to such a relationship. And I think it also follows that the term "relatives" must be taken not in the strict legal sense—not in the sense of those who are connected only with the testator by ties which the law recognises as legitimate, but as including all those in the previous part of the will who have been in effect called by him relatives, whether the legitimate tie exists between him and them or whether it does not. We were told that it was the law established by authority that, when a testator has used language in his will which designates the persons to take by the name of a tie which the law recognises, you must not include in the class even such persons as might popularly be comprehended in the tie, unless indeed you can see that the testator in the clearest and most unmistakable way has so said. It seems to me that the law as laid down in *Hill* v. *Crook* (1) by Lord *Cairns* is the true law,—and although I do not disguise from myself that many judges, from Lord *Eldon's* time down to the present, judges of the highest authority and of the greatest learning, have used language (so to speak) of warning, and language that amounts to more than Lord *Cairns* has said—have used language to the effect that you must, before you can include under the name which the law usually appropriates to a legitimate tie persons who stand outside that strict line, find a necessary inference, or a very clear intention to that effect—it seems to me that the only weight one can give to such language is to treat it not so much as a canon of construction as a counsel of caution to warn you in dealing with such cases not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion. But I protest, that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed. You require no more counsellors to assist you; and after once arriving at the journey's end, to pause in giving effect to the true interpretation because, forsooth, the language has not been framed according to some measure or standard of correct

(1) Law Rep. 6 H. L. 265, 285.

expression, which is supposed to be imposed by judges out of regard for social or other reasons, appears to me to be using the language of such learned judges, not as laying down canons for construing a will, but as justifications for misconstruing it. As soon as you once arrive at your journey's end you have no more to do than to give effect to the true construction as you see it. It seems to me that here the true construction of the will must be that in the term "relatives hereinbefore named" the testator intended to include all those he had before treated as relatives, whether he was correct in law in so treating them or not, and the children of those whom he had referred to in the preceding clauses.

Solicitors: *Satchell & Chapple; Druces & Attlee; Lowe & Co.; Wadeson & Malleson; Witham, Lambert, & Roskell; Walker & Whitfield; Hasties.*

M. W.

KAY, J.
1890
Feb 19; March 5.

BRISTOL, CARDIFF, AND SWANSEA AERATED BREAD COMPANY *v.* MAGGS.

[1889 B. 535.]

Vendor and Purchaser—Specific Performance—Contract—Letters—Offer to Sell—Withdrawal—Time.

Although two letters standing alone might be evidence of a sufficient contract, yet a negotiation for an important term of purchase and sale carried on afterwards is enough, on the principle of *Hussey* v. *Horne-Payne* (1), to shew that the contract was not complete.

An offer to sell property may be withdrawn at any time before acceptance, even though a period is stated during which the offer is to remain open.

M., a baker, on the 29th of May, 1889, wrote to *G.*, a director of an Aerated Bread Company, the following letter:—

"I beg to submit to you the following conditions for disposal of my business carried on at 15, *Duke Street, Cardiff*. Lease and goodwill, £450 (lease from the 29th of September, 1888, for fourteen years). All fixtures, fittings, utensils, &c., stock-in-trade connected with the premises to be taken at valuation. Yours truly, *R. M.* This offer to hold good for ten days."

On the 1st of June, 1889, *G.* replied: "I accept your offer for shop and lease, &c., 15, *Duke Street, Cardiff*. Yours truly, *J. G.* (for *B., C., and S. Aerated Bread Company*). Mr. *R. M.*"

M.'s solicitor then sent *G.* a formal memorandum of agreement comprising several terms not expressed in the two letters. The company's solicitors added a clause restricting *M.* from carrying on a similar business within certain limits. A correspondence then followed between the solicitors for the company and for *M.* respecting the terms of the memorandum, and on the 7th of June, 1889, *M.'s* solicitor wrote withdrawing the offer.

In an action by the company against *M.* for specific performance of the contract alleged to be constituted by the two original letters:—

Held, that, although those two letters would, if nothing else had taken place, have been sufficient evidence of a complete agreement, yet the company had themselves shewn that the agreement was not complete by stipulating afterwards for an important additional term, namely, the restriction on *M.'s* carrying on business, which kept the whole matter of purchase and sale in a state of negotiation only; and that *M.* was therefore at liberty to put an end to the negotiations by withdrawing his offer, though within the ten days mentioned in his letter.

THIS was an action by the Plaintiffs, the *Bristol, Cardiff, and Swansea Aerated Bread Company (Limited)*, against the Defendant,

(1) 4 App. Cas. 311.

a baker and confectioner carrying on business at 15, *Duke Street, Cardiff*, for the specific performance of a contract alleged to be constituted by two letters. The first was written by the Defendant to Colonel *Guthrie*, a director of the Plaintiff company, and was as follows:—

"*Cardiff*, 29th of May, 1889.

"Dear Sir,—I beg to submit to you the following conditions for disposal of my business carried on at 15, *Duke Street, Cardiff*. Lease and goodwill, £450 (lease from the 29th of September, 1888, for fourteen years). All fixtures, fittings, utensils, &c., stock-in-trade connected with the premises to be taken at valuation.

"Yours truly,
"*R. Maggs.*

"This offer to hold good for ten days."

The letter did not on the face of it shew to whom it was written. Colonel *Guthrie*, writing with the authority of the board of directors of the company, replied as follows:—

"*Cardiff*, 1st of June, 1889.

"Dear Sir,—On behalf of the *Bristol, Cardiff, and Swansea Aërated Bread Company* (*Limited*), I accept your offer for shop and lease, &c., 15, *Duke Street, Cardiff*.

"Yours truly,
"*John Guthrie.*
"For *B., C., and S. Aërated Bread Company.*

"Mr. *R. Maggs*,
"15, *Duke Street, Cardiff*."

On the 2nd of June, 1889, the Defendant's solicitor sent Colonel *Guthrie* a formal memorandum of agreement for approval, with an accompanying letter. This memorandum was altered by the Plaintiffs' solicitors, mainly by the insertion of a clause preventing the vendor for five years from carrying on a like business within the borough of *Cardiff* or within a distance of five miles from the Townhall. The memorandum so altered was returned on the 4th of June, with a letter of the Plaintiffs' solicitors. On the 5th of June the Defendant's solicitor wrote sending the draft again to the Plaintiffs' solicitors, with a modification of the

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proposed additional clause. On the 6th of June the Plaintiffs' solicitors wrote that they could not themselves agree to the proposed modification, but that they had asked Colonel *Guthrie* to call about it.

On the 7th the Defendant's solicitor wrote that he regretted the Plaintiffs' solicitors had not agreed to the terms of the draft contract, and continued: "Colonel *Guthrie* has not been near me, and by my client's instructions I beg to inform you that he declines to proceed further in the matter."

On the 8th Colonel *Guthrie* saw the Defendant's solicitor and said he had come to settle the agreement which had been returned to him. The answer was that he was too late; the Defendant had made other arrangements. Colonel *Guthrie* replied he was prepared to sign the agreement leaving out the disputed clause. The solicitor declined; and Colonel *Guthrie* went immediately to the Defendant, who told him that he wished to have the agreement cancelled, because his son was very much against his parting with the shop. The Defendant, it appeared, did not suggest that there was no agreement, but asked Colonel *Guthrie* to use his influence with his co-directors to get the sale cancelled. The memorandum of agreement contained several terms not expressed in the letters; for example, it provided for the book debts and books of account being reserved to the vendor and for the payment of a deposit of £45; it fixed the 24th of June as the day for completion of the purchase and delivery of possession; it provided for delivery of abstract of title and the date from which it was to commence, and for other matters, all of which were more or less of a formal nature.

The action now came on for trial.

Levett, for the Plaintiffs:—

I submit that the two letters of the 29th of May, and the 1st of June, 1889, constitute a complete contract; and the mere fact that the parties contemplated the preparation of a formal contract does not make the letters the less a binding contract: *Bonnewell* v. *Jenkins* (1); *Bolton Partners* v. *Lambert* (2).

[KAY, J.:—According to the decision of the House of Lords

(1) 8 Ch. D. 70. (2) 41 Ch. D. 295.

in *Hussey* v. *Horne-Payne* (1), I must look at the whole of the correspondence between the parties, and not to part of it only.]

There, as Lord *Cairns* points out (2), the two original letters relied on did not contain the whole of the terms. In *Bolton Partners* v. *Lambert* (3), Lord Justice *Cotton* observes (4), that in *Hussey* v. *Horne-Payne* the two original letters were held by Lord *Cairns* not to form a completed agreement because they themselves contained terms which raised the doubt. Here the terms contained in the two original letters were precise and definite, and therefore *Hussey* v. *Horne-Payne* is not in my way. The Defendant was too precipitate in rescinding the contract. He ought to have given us a proper time to withdraw.

[KAY, J., referred to *Preston* v. *Luck* (5).]

Warrington, for the Defendant:—

I say there was no agreement concluded by the letters. First, there was a most important omission from them, having regard to the nature of the business, namely, of the date from which the contract was to take effect; and, secondly, they contained no allusion to the book debts or books of account—whether they were to be included in the purchase or not. Moreover, the unsigned memorandum submitted to the Plaintiffs contained various matters not mentioned in the letters. The subsequent correspondence between the parties in fact shews that the question as to whether there should be concluded agreement or not was still open, for they discussed, among other points, the important question of restricting the Defendant from carrying on business.

In *Bonnewell* v. *Jenkins* (6), the formal contract referred to was nothing more than a contract to carry out the existing negotiations contained in the two letters. Here the letters fixed no time for completion: and in *May* v. *Thomson* (7), it was held that as the letters relied on left the time for the commencement of the purchase uncertain, and as the parties contemplated a

(1) 4 App. Cas. 311.
(2) Ibid. 321.
(3) 41 Ch. D. 295.
(4) 41 Ch. D. 306.
(5) 27 Ch. D. 497.
(6) 8 Ch. D. 70.
(7) 20 Ch. D. 705, 717.

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formal agreement, there was no binding contract. *Hussey* v. *Horne-Payne* (1) is conclusive, that in order to establish a contract by letters the Court cannot take two letters such as these by themselves, but must look at all other letters between the parties or their solicitors relating to the same matter. Here the two original letters must be regarded as merely forming the basis for a subsequent agreement.

Levett, in reply:—

The differences between the terms contained in the letters and those in the unsigned memorandum are not sufficient to rescind a binding contract constituted by the letters themselves, and our solicitors had no authority to rescind. Suppose that in preparing a lease usual covenants are inserted—that would not be sufficient to destroy the contract for the lease. Here there was no disagreement between the parties about the terms of the purchase as stated in the two letters. As to the absence of any fixed time for the completion of the purchase, it is not essential to the validity of an agreement that it should state the day for completion, for the Court itself will fix the date and make the parties bargain for a reasonable time: *May* v. *Thomson* (2). It seems clear that the parties themselves, apart from their solicitors, thought, at the time the offer was accepted, that there was a binding contract; that there was no intention to vary it, but only that it should be put into legal form.

1890. March 5. KAY, J. (after stating the facts, continued):—

The contested stipulation in the memorandum of agreement as to restricting the vendor from carrying on a like business to that which he had sold was not by any means a matter of form. After some conflict of opinion, it has been decided by the Court of Appeal, in *Pearson* v. *Pearson* (3), that a man who sells the goodwill of a business may not only set up a similar business next door and say that he is the person who carried on the old business, but that he may also solicit the customers of the old business to continue to deal with him, although by these proceedings he

(1) 4 App. Cas. 311. (2) 20 Ch. D. 705.
(3) 27 Ch. D. 145.

might not only destroy all benefit to the purchaser of the thing which he had bought, but might recover to himself the actual possession of it. Such a fraudulent proceeding, according to the decision, cannot be prevented by any Court of Law or Equity. It follows that the stipulation which the company's solicitors introduced into the draft was one which they were not entitled to insert if the two letters which I have read were a complete contract. In other words, they were trying to obtain an additional and most important concession from the vendor. Now, put aside for a moment the *Statute of Frauds* and decided cases, and suppose this to pass in conversation: *A.* offers to *B.* his business, lease, and goodwill for £450. *B.* says, "I accept." A day or two afterwards *B.* asks *A.* to engage not to carry on a similar business within a distance of five miles. *A.* answers, "I cannot agree to that, but I will if you say three miles." *B.* takes time to consider, saying he will send an agent next day to settle the terms. The agent does not go next day, and *A.* accordingly says to *B.*, "I put an end to the matter." No one could doubt that that would be a continuous negotiation, and that *B.* could not say, "I will disregard all that followed the acceptance of the first offer, and insist on there being a complete contract by that acceptance." Well, then, still leaving out of sight the statute and authorities, suppose all this to take place by letters between *A.* and *B.* instead of conversation; it is obvious the result must be the same. Some of the letters being by the principals and some by the solicitors could not make any difference.

Now, what effect has the *Statute of Frauds* upon such a transaction? Certainly it was not intended to turn a negotiation into an agreement. There was danger of fraud and perjury if parol agreements as to land could be enforced. To obviate this it was enacted: "No action shall be brought whereby to charge . . . any person . . . upon any contract or sale of lands . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Lord *Mansfield*, in 1766, pointed out that it had often been said of this statute "that it should never be so turned, construed, or used, as to protect or be

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a means of fraud": *Carter* v. *Boehm* (1). This has been repeated again and again since his time; and, very recently, in *Jervis* v. *Berridge* (2), and in *Hussey* v. *Horne-Payne* (3) Lord *Selborne* said, in effect, that the *Statute of Frauds* was a weapon of defence, not offence. The real truth is that the statute was not meant to affect contracts in any way, but only the evidence of them. It does not provide that a memorandum duly signed shall be a contract, but only that no contract concerning land shall be proved by any lower evidence than such a written memorandum. The question whether the two letters relied on in this case were a complete contract, or were only steps in a negotiation, is altogether independent of the *Statute of Frauds*.

Then I must consider the authorities on the subject. Is there anything in them which prevents my deciding this case according to what seems to me the common-sense view of the transaction? In *Hussey* v. *Horne-Payne*, Lord *Cairns*, dealing with a case in which it was proposed to satisfy the requirements of the *Statute of Frauds* through the medium of letters which had passed between the parties, said this (4): "It is one of the first principles applicable to a case of the kind, that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, 'We will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties, you must look at the whole of that which took place and passed between them." Lord *Cairns* then considered the two letters which in that case it was contended constituted the agreement, putting aside the words, "subject to the title being approved by our solicitors," which occurred in the latter of them. He found that in the previous negotiation there had been a verbal suggestion by one of the parties, which was acquiesced in by the other, that the purchase-money should be paid by instalments. What these instalments were to be was to

(1) 3 Burr. 1905, 1919.
(2) Law Rep. 8 Ch. 351, 360.
(3) 4 App. Cas. 311.
(4) Ibid. 316.

be thereafter settled. There was a subsequent negotiation about this; but before it was ended one of the parties died. The conclusion drawn by Lord *Cairns* from what the appellant himself stated was (1) "that the two original letters, which, if you took them alone without any knowledge supplied to you of the other facts of the case, might lead you to think that they represented and amounted to a complete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of those other terms." And he finds the result to be, "that there was in point of fact no completed agreement between the parties." His Lordship then considers the words which he had put aside, and treats them as meaning only that the title must be investigated and approved in the usual way.

Lord *Selborne* concurs both in the reasons and the conclusion of Lord *Cairns*, and adds (2) that he cannot agree "that because two letters were written, by which the conditions required by the *Statute of Frauds* would have been satisfied, if there were nothing outside those letters to the contrary, therefore there is here such a concluded agreement as a Court of Equity ought specifically to perform, without regard to what preceded, or what followed." [His Lordship then read the remainder of Lord *Selborne's* speech, and proceeded:—] I have examined that case carefully, because it has been suggested that the judgment of Lord *Cairns* proceeds upon the circumstance that the two original letters contained terms which raised a doubt whether there was a concluded contract, and an observation to that effect of one of the Judges of the Court of Appeal in *Bolton Partners* v. *Lambert* (3) is relied on.

I have read Lord *Cairns'* speech more than once, and, with deference, I do not think that to be a just criticism. Both he and Lord *Selborne* seem to me to lay down broadly that, where it is sought to make out a binding contract from correspondence, the whole of it, as well as the verbal communications at inter-

(1) 4 App. Cas. 320. (2) 4 App. Cas. 323.
(3) 41 Ch. D. 306.

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views, should be regarded, and it is not right to stop at one letter of the correspondence which, with what preceded, might constitute a sufficient agreement within the *Statute of Frauds*; whereas if the whole of the correspondence were considered, and particularly, as Lord *Selborne* says, "the sequel" of the communications, it may clearly appear that those letters were, in truth, only part of an uncompleted negotiation.

As was said in *May* v. *Thomson* (1), the case of *Hussey* v. *Horne-Payne* (2) "shews that we must look at the whole correspondence from beginning to end. Of course if we find a few letters which are perfectly plain in themselves, which shew an agreement, and the parties do not follow them up by further correspondence, we have a comparatively easy case; but where each letter is followed immediately by another which suggests something else as a topic of further discussion, it becomes most dangerous to draw a line after any particular letter."

With that view of the decision of *Hussey* v. *Horne-Payne* I entirely agree; and so understood it is a valuable and important authority, pointing out and obviating the great danger which arose from the course of modern decisions upon contracts by correspondence, namely, that the *Statute of Frauds*, which was passed merely to alter the law as to evidence of a contract, might be used as a trap to catch an unwary vendor or purchaser, and bind him by a contract when the real intention was negotiation only.

The only difference between that case and the present is that in the former there had been, before the letters in question were written, an understanding, not expressed in them, that the purchase-money was to be paid by instalments, the amount of which remained to be settled. In this case there was no anterior understanding as to the restriction of the vendor's right to carry on a similar business to that sold. The negotiation as to that arose after the two letters relied on had passed. But it was begun by the solicitors of the Plaintiffs, who are now seeking to rely on the two letters only. Their position, therefore, is, that they were not satisfied with the terms of the two letters, but themselves reopened the matter by negotiating for another most

(1) 20 Ch. D. 705, 723. (2) 4 App. Cas. 311.

important advantage; and having thus treated the two letters as part of an incomplete bargain, it would be most inequitable to allow them to say, "Although we thus treated the matter as incomplete and a negotiation only, yet the Defendant had no right to do so, but was bound by a completed contract."

In my opinion, the decision of *Hussey* v. *Horne-Payne* (1) completely covers this case. I understand it to mean, that if two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to shew that the contract was not complete; and, so far as my own judgment is concerned, I entirely agree in the justice and equity of such a rule.

Cases have been referred to in which a subsequent discussion as to the preparation of a formal contract, even where the letters mention that such a contract is contemplated, has been held not to prevent the letters from being themselves a binding contract. There are many such decisions, and the distinctions between some of them are remarkably fine: see *Crossley* v. *Maycock* (2).

But they are all subject to the observation that the formal document contemplated is one which is to put into more correct form a completed agreement, not to alter that agreement by adding a substantial term to it. I have already pointed out that the subsequent negotiation in this case was in no sense concerning a matter of form, but was a negotiation for an additional term to which the Plaintiffs had no right, according to existing decisions, at law or in equity.

It was suggested that the ten days during which the offer was to remain open had not expired when it was withdrawn. But this can make no difference. The offer was not a contract, and the term that it should remain open for ten days was therefore not binding. It has often been held that such an offer may, notwithstanding, be withdrawn within the time limited. *Routledge* v. *Grant* (3); *Cooke* v. *Oxley* (4); *Dickinson* v. *Dodds* (5).

I decide this case against the Plaintiffs upon the ground, that although the two letters relied on would, if nothing else had

(1) 4 App. Cas. 311.
(2) Law Rep. 18 Eq. 180.
(3) 4 Bing. 653.
(4) 3 T. R. 653.
(5) 2 Ch. D. 463.

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taken place, have been sufficient evidence of a complete agreement, yet the Plaintiffs have themselves shewn that the agreement was not complete by stipulating afterwards for an important additional term, which kept the whole matter of purchase and sale in a state of negotiation only, and that the Defendant was therefore at liberty to put an end to the negotiations, as he did, by withdrawing his offer.

The action must be dismissed with costs.

Solicitors: *Prior, Church, & Adams*, agents for *Meade King, & Bigg, Bristol; Field, Roscoe & Co.*, agents for *G. F. Hill, Cardiff.*

G. I. F. C.

CHITTY, J.

1890

April 26; *May* 2.

In re GEORGE. FRANCIS *v.* BRUCE.

[1890 G. 51.]

Promissory Note—Payable on Demand—At Maturity—Express Waiver—Direction in writing to destroy—Renunciation—Bills of Exchange Act, 1882, *ss.* 62 *sub-s.* 1, 89.

A promissory note payable on demand with interest from the date thereof, is a present debt, and "at maturity" as soon as given; and a written direction by the holder of such a note, that it be destroyed as soon as found, though given *in articulo mortis*, and because the note could not at the time be found to be cancelled or given back to the maker, is not an absolute and unconditional renunciation of the rights of the holder, within the provision of the Bills of Exchange Act, 1882, s. 62, sub-sect. 1. "The renunciation" "in writing," required by the statute must be in itself a record of the renunciation, not a memorandum or note of the renunciation or of an intention or desire to renounce.

ADJOURNED SUMMONS.

T. W. George, by his will, dated the 6th of July, 1887, bequeathed to his niece, Mrs. *Margaret Anne Francis*, the Plaintiff, the sum of £6000, and by a codicil, also dated the 6th of July, after referring to this bequest and to the fact that he had lent the Plaintiff a sum of £2000, declared, that if at his death the said sum of £2000 or any part thereof, or any interest thereon, should be owing from the said *M. A. Francis*, "then and in such case all moneys due to me as aforesaid shall be deducted from the said legacy of £6000 which I have by my said will bequeathed to or for the benefit of the said *M. A. Francis* and her children, and I direct that in such case the said legacy shall be reduced accordingly in satisfaction of the moneys due to me as aforesaid."

The sum of £2000, referred to by the testator, was lent by him to the Plaintiff in September, 1886, when the Plaintiff executed and gave to him a promissory note in the following terms: "On demand I promise to pay to Mr. *T. W. George* or his order the sum of two thousand pounds, together with interest thereon after the rate of four pounds per centum per annum from the date hereof for value received."

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Interest was paid on this note up to the 6th of March, 1889. On the 30th of August, 1889, the testator died. Some two or three hours before his death, the testator directed the promissory note to be brought to him that he might destroy it; search was made, but the note could not be found. The testator then declared to the Plaintiff, in the presence of two other persons, that he wished to give the £2000 to her, and to forgive her the debt. The nurse was then sent for, when the testator told her that he had lent the Plaintiff £2000, and that he wished to forgive the debt, and that he ought to have destroyed the note, but it could not be found for that purpose; he then made the nurse promise that she would see the note destroyed, and that she would testify that it was his wish that it should be destroyed as soon as found, and he told her that she had better write this down. The nurse then and there wrote down on the back of a letter she had in her pocket a memorandum as follows: "30th August, 1889. It is by Mr. *George's* dying wish that the cheque (*sic*) for £2000 money lent to Mrs. *Francis* be destroyed as soon as found. Mr. *George* is perfectly conscious and in his sound mind. (Signed, Nurse *T.*)." This memorandum the nurse stated in evidence was, with the exception of the last sentence, written at the instance of the testator. The story told by the nurse was corroborated by another member of the family and otherwise. After the testator's death the note was found by the executors; but under the circumstances they did not consider themselves justified in paying the Plaintiff the legacy of £6000 in full without the direction of the Court, and accordingly the Plaintiff took out an originating summons against the executors to determine the question whether the promissory note had been duly cancelled.

Romer, Q.C., and *Upjohn*, for the Plaintiff:—

We do not contend that what took place amounted to a *donatio mortis causâ*, or that the memorandum operated as a revocation of the codicil, but we do say that this memorandum is a renunciation in writing within sect. 62, sub-sect. 1, of the *Bills of Exchange Act*, 1882. Before the *Bills of Exchange Act*, 1882, a simple contract, might, before breach, be waived without deed and

without consideration, but after breach, only by deed or upon sufficient consideration; bills of exchange were an exception, and could be waived by parol and without consideration: *Foster* v. *Dawber* (1); *Byles* on Bills (2). Promissory notes were on the same footing as bills of exchange. Sect. 62 of the Act of 1882, which is made applicable to promissory notes by sect. 89, has only made a limited alteration in the old law, and only applies to a waiver "at or after its maturity." The note was not "at maturity" when testator died, for there is no evidence of payment having been demanded and refused: *Barough* v. *White* (3); *Byles* on Bills (4).

[CHITTY, J., referred to *Christie* v. *Fonsick* (5); *Rumball* v. *Ball* (6); *Collins* v. *Benning* (7); *Norton* v. *Ellam* (8); *Jackson* v. *Ogg* (9).]

A promissory note payable on demand differs from a bill or cheque, since it is very often originally intended as a continuing security: this was the testator's intention in the present case.

[*Capp* v. *Lancaster* (10), *Garden* v. *Bruce* (11), and *Darby* and *Bosanquet* on *Statute of Limitations* (12) were also referred to.]

Then, assuming that this note was "at maturity," we say that the memorandum is a complete renunciation in writing. Sect. 62 does not say that the renunciation must be signed by the holder, and where the Act intended signature to be an essential part of the transaction it has said so, *e.g.*, sect. 17, sub-sect. 2 (*a*), where signature of drawee required. Then why go outside the words of the section? The writing by the nurse at testator's instance is sufficient to satisfy the requirements of the section; she was his amanuensis or agent, and an agent may sign; that is contemplated in some cases, and is provided for by sect. 26, sub-sect. 1.

[CHITTY, J., referred to *Re Lewis* (13).]

Byrne, Q.C., and *Dunning*, for the Defendants, the executors,

(1) 6 Ex. 839.
(2) 11th Ed. p. 196.
(3) 4 B. & C. 325.
(4) 11th Ed. p. 168.
(5) 1 Selw. N. P. 399, 12th Ed.
(6) 10 Mod. 38.
(7) 12 Mod. 444.
(8) 2 M. & W. 461.
(9) Joh. 397.
(10) Cro. Eliz. 548.
(11) Law Rep. 3 C. P. 300.
(12) Page 20.
(13) 1 Q. B. D. 724.

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were not called upon on the point whether the note was "at maturity" at the time of the testator's death:—

Even had this memorandum been signed by the testator it would not have been sufficient. It is not an absolute and unconditional renunciation of the rights of the holder; it is only evidence of his intention at that time that the note should be destroyed at some future time. What sect. 62, sub-sect. 1, requires is a record of the renunciation, not a mere direction to destroy, which might be revoked and altered at any time.

Romer, in reply:—

The word "renounce" is not necessary; the intention to renounce is clear; it is absolute and unconditional in terms; it is stated to be the testator's "dying" wish, and, therefore, final; if he had recovered he could not have gone back from this direction; it is also immediate, because the note was to be destroyed "as soon as found"; therefore, we submit, it is an absolute and unconditional record in writing of his intention to waive this debt.

CHITTY, J. (after stating the will and codicil and the promissory note, and that the question was whether the note was discharged in the lifetime of the testator, continued):—

The argument for the Plaintiff is, that this being a promissory note, at Common Law the debt would be waived, and that the *Bills of Exchange Act*, 1882, s. 62, sub-s. 1, has only made a limited alteration in the law, and does not apply to a waiver of a bill or note before its maturity, but only "at or after its maturity"; and seeing that the present is a note payable on demand with interest, it is said it was not "at maturity" when the testator died, and that, therefore, the case is not affected by the 62nd section. [After reading sect. 62, sub-sect. 1, his Lordship continued:—]

The first point, therefore, is, when is a note payable on demand "at maturity"? That question, though not exactly in this form, has been often considered. Of the various cases which have been referred to in argument, I will take one only—*Norton* v. *Ellam* (1).

(1) 2 M. & W. 461.

In that case there was a note payable with interest on demand, and the question was from what time the *Statute of Limitations* began to run. Baron *Parke*, in giving judgment, says (1): "I entertain no doubt at all on this point. It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all: if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan." The note I have before me was for money lent. "Where money is lent, simply, it is not denied that the statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*." I mention this authority alone, though there are many previous decisions to the same effect, because it appears to me to be decisive on the point that was argued with reference to the 62nd section, viz., that this note was not at maturity when the testator died.

Then comes the question, whether there is a "renunciation" "in writing" within sect. 62, sub-sect. 1. I entertain no doubt of the integrity and trustworthiness of the witnesses, and I entertain no doubt also that it was the testator's intention to forgive, or discharge this note in favour of the Plaintiff. I am quite satisfied with the evidence on this point. Sect. 62, sub-sect. 1, says the renunciation must be in writing, unless the bill is delivered up to the "acceptor," and, changing the language to suit the present case, that would be, unless the note is delivered up to the maker. The statute contains provisions for the cancellations of bills of exchange, and, therefore, of promissory notes also. So that it is quite clear, that if this note had been in the testator's possession at the time, he would have had it destroyed: upon that point I entertain no doubt. I have, however, to deal with the statute, which is not confined, of course, to cases such as this,

(1) 2 M. & W. 464.

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but is a statute as to bills of exchange, and has a wide operation among mercantile men; and I feel that I must be on my guard not to allow any sympathy I may have with the Plaintiff on the facts of the case in any way to influence my judgment in construing this section; because I might, if I did give way on such a ground as that, be inflicting considerable injury upon merchants and others.

Now, it is plain that what must be in writing is an absolute and unconditional renunciation of rights. It is not necessary to put those words in; but that must be the effect of the document. Then the document is not to be a note or memorandum of the renunciation or of an intention to do it, but it must be itself the record of the renunciation. I am not called upon to say whether the words, "the renunciation must be in writing," involves the signature; and I do not propose to say anything which would tend to show it was my opinion that the renunciation in writing need not be signed. I see great danger in holding that the signature is not required. I leave the point wholly undetermined. This section, as has been properly pointed out, does not, in terms, say that the writing must be signed by the holder of the bill or note; and it does not, in terms, say that the writing may be signed by anybody on his behalf—that is, by an agent; and, no doubt, there are other sections where signature is spoken of, and it must be the signature of the person himself, or there may be cases where it is signed by the agent, and provisions are made to that effect in the statute.

But now I take the document which I have before me, and compare it with the statute. The facts are these. [His Lordship then stated the facts as to the writing of the memorandum by the nurse, and continued:—] That memorandum was, no doubt, meant to be evidence of his intention. The document is signed by the nurse, and it was an authority to those concerned, if the note had been found, to destroy it in his lifetime.

But is that an absolute and unconditional renunciation in writing of the testator's rights on the note? Mr. *Romer's* argument (to put it shortly) was this, that it is final because it is stated it is Mr. *George's* dying wish, and that it is immediate because the note was to be destroyed as soon as found. But the real question,

I think, is this; is the direction to destroy the note as soon as found an absolute and unconditional renunciation of the rights on the note? I put the proposition in that way; for I think it is the fairest way to state it in favour of the Plaintiff. I am now assuming that this is a writing by the testator—an assumption that I am making in favour of the Plaintiff.

The pertinent question is, could not the testator, after this paper had been signed by the nurse, have gone to the bank, if he recovered, where he supposed the note to be, to get it, or if it was found afterwards and brought to the testator, could he not say, "I have changed my mind"? I think he could. I think I am bound in point of law to say that he could.

Having examined the case with all the care that I think could be given to it, I am unable to come to the conclusion that this was an absolute and unconditional renunciation in writing such as is required by the statute.

Solicitors: *E. K. Francis; Bell, Brodrick, & Gray.*

W. C. D.

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Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 8, *sub-ss.* 1, 3, *s.* 79, *sub-s.* 5 [*Revised Ed. Statutes, vol. xiv., pp.* 204, 220]—*Memorandum of Association—Construction—Winding-up—Just and equitable Cause—Substratum gone—Petition—Rehearing.*

The name of a company is important in construing the objects defined in the memorandum of association.

A statement in the memorandum of association of a company that its objects were to carry on any business that the company might think profitable would not be such statement of objects as is required by the *Companies Act*, 1862.

Where a company has ceased to carry on its proper business, but carries on a business *ultrà vires*, a shareholder is not confined to a remedy by injunction, but is entitled to have the company wound up.

A company was registered under the name of the *Mid-Northamptonshire Bank, Limited.* In addition to wide and general objects, the memorandum of association stated particularly numerous objects of diverse character in fifteen paragraphs. The first three paragraphs related to banking, discounting, and money-lending, and borrowing respectively; others referred to purchasing and developing land, investing and dealing in shares and securities, and promoting companies. The company commenced business as a country bank in *Northamptonshire*, with an office in *London*. After a short time its name was changed to the *Crown Bank, Limited;* it gave up its country offices, ceased to do banking business, and carried on in *London* in addition to some land speculation and business connected with promoting a foreign company, the business of investing in shares and securities.

On a petition by a shareholder to wind up the company on the ground that its main objects had failed:—

Held, that the company were not carrying on a business authorized by the memorandum of association, and that it was just and equitable that the company should be wound up.

Where an order for winding up a company has been delivered out, but not passed and entered, the Court by consent dismissed the petition.

THIS was a petition by Mr. *Buckley*, a shareholder, to wind up a company on the ground that it was just and equitable that the company should be wound up, that the main objects of the company had failed, and that unless the company were so wound up the uncalled-up capital of the shareholders would when paid be applied in carrying on a business other than a legitimate banking business.

The company was registered on the 25th of January, 1888, under the name of the *Mid-Northamptonshire Bank, Limited*, with a share capital of £250,000 in £10 shares. The memorandum of association provided, "The registered office of the bank will be situate in *England*." The objects for which the bank was stated to be established were divided into fifteen paragraphs lettered from (*a*) to (*o*) inclusive. Paragraph (*a*) was, "The carrying on the business of bankers in all its branches with all incidental matters and things connected therewith, and generally all banking and monetary operations, and either as principals or agents, and either alone or conjointly with any other company or person or persons, and for the purposes aforesaid, or in common with any of the said objects, the acquisition and holding or resale of real and personal estate either by way of security, investment, or otherwise."

Paragraph (*b*) related to discounting bills and lending money, (*c*) to borrowing money. The next two paragraphs were as follows:—

"(*d.*) The investing, varying, and dealing with the moneys of the bank in or otherwise acquiring and holding any of the investments following (that is to say), the shares, stocks, bonds, obligations, debentures, debenture stock, scrip, and securities of any company, trust or corporation formed under British, foreign, or colonial law, whether general or special, or of any government, state, dominion, sovereign, province, municipality, or ruling or public authority, British, foreign, or colonial, or for the payment of the principal or interest of which the credit or any property or revenue of any such government, state, dominion, sovereign, province, municipality, or ruling or public authority is pledged, charged, or made liable, and upon such other securities and in such manner as may from time to time be determined.

"(*e.*) The acquiring or leasing of land, buildings, and property in the county of *Northampton* and elsewhere, either in or out of *England*, of any tenure, or any easements or privileges, share or shares, interest or interests therein, and the erection and improvement of buildings thereon, and the using, letting, underletting, leasing, selling, managing or otherwise dealing with the same property and buildings, and to sell, improve, manage,

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develop, lease, mortgage, dispose of and turn to account or otherwise deal with all or any part of the property of the bank."

(*f*) related to the acting as agents in and guaranteeing the issue of shares and securities, the payment of dividends and repayment of principal on such securities, the acting as agents for holders of foreign securities, and the acting as agents in sales and collecting moneys.

(*g*) related to the business of a deposit company.

(*h.*) The undertaking trust offices.

(*i.*) The formation and promotion of clubs, companies, and other societies.

The other six paragraphs were of a general character, very wide in their terms, including power to apply for Acts of Parliament. The company did not commence operations immediately. In April, 1888, a prospectus was issued inviting applications for shares. It was headed the *Mid-Northamptonshire Bank, Limited*; the first page contained the names of the officers of the company; described the offices—*London*, 56, *Cheapside*; *Rushden*, 1, *Bank Buildings*, *High Street*—and stated, "Branches will be opened in *Northampton*, *Kettering*, and other places."

The prospectus proceeded:—

"This bank has been formed for the purpose of extending banking facilities in the county of *Northamptonshire*, more particularly in the parliamentary division of *Mid-Northamptonshire*, where from the rapidly-increasing manufacturing population in the boot trade, and other local circumstances, it is known there is a profitable field for further banking operations. There has been no new bank established in *Northamptonshire* for fifty-two years. The population was then 179,336; it is now over 277,035.

"Of all joint stock undertakings, banks as a class have been the most successful dividend-paying concerns, some paying over thirty per cent. on their share capital; and there can be no doubt of the success of an enterprise of this nature in this district, where, in addition to the numerous populous country towns and villages and the usual agricultural population, the boot trade, the staple industry of the county, is largely on the increase, being carried on successfully by many small manufacturing firms, and amongst

a population hitherto inadequately supplied with banking accommodation.

"Branches and agencies will be opened as favourable opportunities occur.

"A special feature will be that the bank, as a corporation, will act as executor to wills; also as trustee in all cases.

"Deposits will be received and interest will be allowed thereon at a rate to be agreed upon. Current accounts will be opened, and interest will be allowed and commission charged proportionate to the character in which the account is kept.

"No promotion money will be paid, so that the whole of the formation expenses and government stamps, up to and including registration and incident thereto, will not exceed £100.

"All profits will belong absolutely to the shareholders.

"Good, permanent, and increasing dividends may be anticipated, having in view the profitable character of the business to be transacted, and the scope for extension afforded by the increasing commerce and population of the district. The directors will use their best exertions to pay ten per cent. the first year.

"The shares of the *Northamptonshire Banking Company*, £5 paid, are now receiving a dividend of ten per cent. per annum, and are selling for £10, being a premium at the rate of 100 per cent.

"The shares of the *Northamptonshire Union Bank*, £8 paid, are now receiving a dividend at the rate of 13¾ per cent. per annum, and are selling for £25, being a premium at the rate of over 200 per cent."

The prospectus contained also a statement as to the position of seventy-eight local and other banks, and referred to a contract for the purchase of banking premises at *Rushden*.

The Petitioner applied for ten shares on the faith of the prospectus, and was allotted ten shares on the 15th of May, 1888. He took ten other shares in July, 1888. The total number of shares allotted was 5441; of these 5000 were allotted to a company called the *Flag Building Company*. £5 per share had been paid up. The directors had recently made calls to the extent of the £5 unpaid. They had commenced an action against the Petitioner for the £100 unpaid on his twenty shares; he had paid £100 into Court. The *Mid-Northamptonshire Bank* carried on

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business as bankers at *Rushden*, from May, 1888, to January, 1889; during one part of that time they had a branch office at *Northampton*; they had a *London* office at 56, *Cheapside*. In January, 1889, the name of the company was changed by special resolution to the "*Crown Bank, Limited*." The premises of the company at *Rushden* were given up, and the entire business was carried on in *London*. From that time forward the banking business of the company was discontinued, but its business consisted of a land speculation and investments in certain securities; there was also some evidence that the company was connected with the promotion of a foreign company. The offices of the *Crown Bank* at 56, *Cheapside*, were at first on the third floor, the first floor being occupied by the *Flag Building Society*, whose business was afterwards taken over by the *Crown Bank*, and the latter company removed to the first floor. The two companies were promoted by the same person, and to some extent had the same directors. At an ordinary meeting of the shareholders of the *Crown Bank*, held at 56, *Cheapside*, the 6th of February, 1889, a resolution was passed authorizing the directors to take over from the *Flag Building Society* a large number of securities of different kinds specified in a list, and to assume the liabilities of the *Flag Building Society*, specified in a list of creditors and depositors. The list of securities comprised 5000 shares in the *Mid-Northamptonshire Bank*, £5 paid, valued at £22,500. A red line had been drawn through this item; but there was no explanatory evidence as to when or by whom such line had been drawn. The list of creditors and depositors comprised six credits —the *Rock Freehold Land Society*, as creditor for £98,000; the *Mid-Northamptonshire Bank* for £6840; three stock brokers for the respective amounts, £58,000, £80,000, and £22,990; and an unclaimed dividend, £29.

On the 9th of June a deed was executed between the *Flag Building Society* and the *Crown Bank*, by which the *Flag Building Society* transferred to the *Crown Bank* a number of securities, chiefly the same as those mentioned in the resolution of the 6th of February, 1889, and the *Crown Bank* covenanted to indemnify the *Flag Building Society* against the liabilities mentioned in the resolution.

The shares in the *Mid-Northamptonshire Bank*, mentioned in the resolution, were not comprised in the deed; they had in the meantime been transferred to a company called the *Rock Investment Trust*, which had been registered in the previous October. This company was also a company that had been promoted by the promoter of the *Mid-Northamptonshire Bank*.

A circular dated the 11th of January, 1889, was issued to the shareholders in reference to the then proposed change of home and removal of the business to *London*, containing the following sentence:—

"The intention of the founders of this bank was that it should be primarily a local bank confined to *Northamptonshire*, and more particularly to the mid-parliamentary division; it was incorporated in January, 1888, and thereupon commenced business in the county; but after nearly a years' experience the directors have decided that owing to the lack of local support they will put the bank on a broader basis, and thus be in a position to do business everywhere."

The only account sent to the shareholders was a balance-sheet appended to an annual report, dated the 4th of February, 1890, by which notice was given of an "annual general meeting," to be held on the 18th of February, 1890. The report referred to a resolution of shareholders passed on the 28th of January, 1890: "That the ascertained loss of £11,630 13*s.* 3*d.*, as shewn by the balance-sheet, be put to a Suspense Account in view of the prospective profit on certain undertakings now in progress." The liabilities and assets were balanced at £236,040 0*s.* 11*d.* On the liabilities side this amount was made up of two items. Capital paid up (half the subscribed capital) £28,530, and deposits, loans, and sundry creditors, £207,510 0*s.* 11*d.*

The assets were made up of—cash, £762 15*s.* 4*d.*; South African Account, investment, and advances, £9721 1*s.* 10*d.*; freehold and leasehold estate, £7293 9*s.* 5*d.*; debtors for land sold, £2814 6*s.* 7*d*; advances, £10,488 7*s.* 9*d.*; office furniture, £359 8*s.* 10*d.*; establishment expenses, £4349 10*s.* 3*d.*; and Suspense Account, as per shareholders' resolution, £11,630 13*s.* 3*d.*

Napier Higgins, Q.C., and *Duke*, for the Petitioner and Mr.

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Curtis, a holder of twenty shares; and *Bramwell Davis*, for the shareholders in support of the petition:—

The ground on which a winding-up order is asked is, that in the opinion of the Court it is just and equitable that the company should be wound up. There are, it must be admitted, few instances where a winding-up order has been made where the circumstances could not be brought within a class *ejusdem generis*. The fact that the substratum of the company is gone is a well-defined cause for winding up a company, because it is just and equitable to do so.

There is, however, no hard-and-fast rule to the effect that that is the only case in which the Court will exercise its jurisdiction to wind up a company because it is just and equitable to do so. In this case the shareholders seeking a winding-up took shares in what they believed to be a genuine local bank, and which was apparently carried on as such for a time. They are outvoted by the holders of shares which are in fact fictitious shares. There never were actually a sufficient number of genuine shares to justify the company in carrying on its business at all. The present business, such as it is, consists mainly in speculations; it is not a proper banking business at all. The business of the company, as indicated by the name of the company, the first set of objects defined in the memorandum, was that of a provincial bank. The share prospectus put forward by the directors, their own report as to earlier dealings, point to the fact that on the true construction of the memorandum the company intended to be formed was a provincial bank, no doubt with large subsidiary power. The circumstances are such that even if the case cannot be brought within a class of cases where the Court has hitherto exercised the jurisdiction to wind up, still the Court will not hesitate, in a case so manifestly within the spirit of the enactment, to make a winding-up order: *Re British Oil and Cannel Company* (1).

But the case is *ejusdem generis* with the second head of circumstances under which an order will be made, that the company has not commenced business within a year, or has suspended business

(1) 15 L. T. (N.S.) 601.

for a year, for such genuine business as the company had has ceased for more than a year.

Lastly, the case really comes within the class of authorities where a winding-up order has been made because the substratum has gone: *In re Suburban Hotel Company* (1); *In re German Date Coffee Company* (2); *In re Haven Gold Mining Company* (3).

Cozens-Hardy, Q.C., and *Kirby*, for the company.

Everitt, Q.C., and *Chadwyck Healey*, and *Percy Wheeler*, for creditors in opposition:—

There is no case either alleged or proved as a ground for winding-up within one of the cases specified under the first four heads in sect. 79 of the *Companies Act*, 1862. It is sought to wind the company up on the ground that it is just and equitable to do so. To do that something distinct and definite *ejusdem generis* as the cases specified under the previous heads must be shewn. The only case in which that head has been acted upon, and it is difficult to imagine any other, is where the substratum of the business of the company has gone: *In re German Date Coffee Company*; *In re Langham Skating Rink Company* (4).

In this case the company is carrying on *bonâ fide* business of a kind specifically provided for by more than one paragraph of the memorandum. The objects here are exceedingly numerous and wide.

[NORTH, J.:—So wide that it might be said to warrant the company in giving up banking business and embarking in a business with the object of establishing a line of balloons between the earth and moon.]

We are not concerned to argue the contrary. It may be that if the memorandum does authorize some extravagant object, a minority of shareholders could not prevent the company from endeavouring to carry that out. The company may carry on all or any of the objects authorized by the memorandum. In this case what the company is doing is not authorized only by general

(1) Law Rep. 2 Ch. 737.
(2) 20 Ch. D. 169.
(3) 20 Ch. D. 151.
(4) 5 Ch. D. 669.

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words, but in distinct particular language. The construction of the memorandum cannot be controlled by the name of the company, an accident the company may by law alter, nor can it be controlled by a prospectus or any acts or reports of the directors. The majority of shareholders, whatever their private motives are, have complete control over the business of the company; the minority have no legal ground of complaint because they are outvoted: *East Pant Du United Lead Mining Company* v. *Merryweather* (1); *North-West Transportation Company* v. *Beatty* (2).

To a large extent the foundation of the petition is either that the Petitioner was induced to take his shares on the faith of misrepresentation or that the company is acting *ultrà vires;* for neither causes can a shareholder get a winding-up order. If he were deceived he could get his contract cancelled, but not winding-up. In this case, as the company was in existence at the time the prospectus was issued, there would not have been a right even to have the contract cancelled on the ground of variance between the prospectus and memorandum: *Peel's Case* (3).

If the company is acting *ultrà vires*, the Petitioner can get an injunction.

Napier Higgins, in reply:—

The Petitioner is too late to repudiate his shares. His having had such remedy does not deprive him of his right to have the business wound up.

It may be the acts the company are doing are *intrâ vires* in the sense that they might be done as subsidiary to the main business, and it might be that the Petitioner would fail in an action for an injunction. Were he to succeed the business would be stopped, and there would have to be a winding-up.

The case of the Petitioner as alleged in his petition, as proved by the evidence, is that the primary and main business the company was formed to carry on—in other words, the substratum of the company—is gone. On that he asks for a winding-up order.

(1) 2 H. & M. 254. (2) 12 App. Cas. 589.
(3) Law Rep. 2 Ch. 674.

NORTH, J. (after stating the facts, after referring to the prospectus and the circular of the 11th of January, 1889, continued):—

Now, that circular seems to me to be very important, for it contains a record made at the time of what I believe to be perfectly correct and accurate—the statement of what the intention of the company was when it was formed, and of the objects for which it was formed.

[After referring particularly to the unsuitableness of the *London* premises for a bank, and referring to the balance-sheet:—]

That does not look very much like the business of a company carrying on banking.

In point of fact, the conclusion I come to is this, that the banking had been definitely and absolutely given up about the year 1888 or the beginning of 1889, and that from that time forward they had started upon a totally different business, commencing with the taking over of the business which the *Flag Building Society* had carried on, and the carrying on of a similar business which, though carried on in the name of the *Crown Bank*, is not a banking business of any sort or kind. The prospectus issued does not indicate any intention of carrying on this speculative business in stocks and shares which has been carried on since that time; and in my opinion the business which has been carried on since then is something entirely and absolutely outside the prospectus, which states (and I believe accurately, as does the circular of January, 1889) the purposes and objects for which the company was formed. That has been, in my opinion, definitely and entirely abandoned, and a totally different business embarked upon.

Then the question is, whether this different business is authorized by the constitution of the company. It is said that when the memorandum of association is looked at, the company had power to do everything which it has done since—that it is acting entirely within its objects as stated in the memorandum of association. It is necessary, therefore, to look at the memorandum. The memorandum states first of all that the name of the company is the *Mid-Northamptonshire Bank, Limited*; and then it goes on to state certain objects.

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Now the name in which the company is started seems to me a very important matter—the *Mid-Northamptonshire Bank, Limited.* It subsequently changed its name—and that it had power to do under the 13th section of the *Companies Act*; but the Act provides in terms that no alteration of name shall affect any rights or obligations of the company; and the company is a company which starts under the name the *Mid-Northamptonshire Bank, Limited.* Then sect. 9 provides what the memorandum of association is to state; and the third paragraph is, that it is to state, among other things, the objects for which the proposed company is to be established. I take that to mean this—that certain objects must be specified as those in which business is to be done. If the memorandum were to state, as the objects of the company, that it was to carry on any business whatever which the company might think would be profitable to the shareholders, in my opinion that would not be a statement of the objects of the company as required by the Act of Parliament. The memorandum here says—"the objects for which the bank is established are," and then follow a number of heads, all lettered, and going down to (*o*).

I have been reminded several times that the bank here is simply the name of the company, and that therefore using throughout in the statement of the objects the name "the bank" is just the same thing as if the name of the company had been used, or as if it had said—"The objects for which the company is established are as follows." I quite agree that that is so—that it does not matter here whether you use the full name or use a short name by way of reference; but it must not be forgotten that the company is the *Mid-Northamptonshire Bank, Limited,* by whatever name you choose to call it afterwards—whether you call it a bank, or call it the company, or the society, or anything else; and it is the business of the *Mid-Northamptonshire Banking Company, Limited,* you now have to deal with. [His Lordship stated the objects of the society as defined by the memorandum of association, and proceeded:—]

Therefore we have here the enumeration of things so large, that when I put it to Mr. *Cozens-Hardy* whether he could say that it would not extend to authorize the company to establish and work

a line of balloons passing backwards and forwards between the earth and the moon, he admitted that he could not say that it would not. There is only one other clause that I need refer to (clause (*m*)), which is a clause which seems to me to have been wholly unnecessary on this construction: it is this—"To apply for any Act of Parliament for effecting any modification of the bank's constitution, or extending its objects, or for any other purpose which may seem expedient." How the parties thought that anything, even an Act of Parliament, could extend the objects in the memorandum as they construe it, I confess I do not understand. It would be ridiculous to attach to this memorandum the meaning which I am asked to give to it—it would be perfectly absurd; and, in my opinion, it would not be a statement of objects within the provisions of the Act of Parliament at all. In my opinion what the company have done is not authorized by this memorandum as it stands. There are very general powers taken that might give large powers for the purpose of carrying on the business contemplated by the company; and I find it shewn by the name of the bank itself, and the statements to which I have already referred, what the objects of the company are. I look at the prospectus and I look at the circular not as limiting the objects contained in the memorandum of association, but as putting a construction upon it, as shewing what the meaning of the parties was in the words they used; and I hold that this memorandum does not contain powers to do things which are utterly at variance in every way with the business of banking in the largest sense, and that it cannot be construed to give them powers to do more than what is necessary for the purpose of carrying on a banking business such as was contemplated by them, as shewn by the name of the company and by the earlier transactions of that company.

In my opinion, therefore, what they are doing now, and what they have been doing for more than a year past, is something entirely outside the objects contemplated by the company, and for which they are authorized to carry on business.

Then it has been pressed upon me more than once, that if what they are doing is *ultrà vires*, there is a well-known remedy open to the parties, and that what they should do is to apply to

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the Court to restrain the doing of what is beyond their powers, and that a winding-up petition is not the proper remedy to have recourse to. As a general rule, I do not dissent from the proposition so put forward; but it must be properly understood, and it must be limited. Supposing, by way of illustration, that a company is formed for the purpose of carrying on a line of steamers between *Liverpool* and *Dublin*, and the company embark upon it and carry on a large and valuable business in that way: supposing that they think the convenient way of carrying it on is to land everything which they take over by their steamers at *Kingstown*, and for the purpose of carrying the same on to *Dublin* to purchase the railway existing from *Kingstown* to *Dublin* (that being, I assume, not a thing within their powers); if that were done, I think that the proper way of preventing it would be not by a proceeding to wind up the company, but by asking for an injunction to restrain the laying out of its funds upon the acquisition of that railway; and that it would be wrong to attempt to prevent their continuing to carry on their legitimate business by giving such relief by way of winding up the company as a whole, instead of staying that part of their business which was beyond their powers. But, then, supposing on the other hand, that for some reason or another (either by reason of the state of politics, or by reason of the existence of a submarine railway, or anything else) the traffic could no longer be carried on by steamers between *Dublin* and *Liverpool*, in my opinion it would not be open to the company to say: "As we cannot employ our capital in this legitimate object, we will lay it out in the acquisition of that railway." If that state of things existed, in my opinion, it would be right to apply the remedy of winding up the company instead of the remedy by injunction to restrain them from doing acts which were beyond their powers. If, therefore, I found in this case that the company were carrying on a legitimate business, and beyond that were doing something which is not a legitimate business, I should decline to interfere by making a winding-up order; but when, on the other hand, I find that the business that they are doing is not legitimate; that even what I hold to have been the legal and authorized objects of the company can no longer be carried on: then I think

it is open to a shareholder to come and ask to have the company wound up; and not the less so because he finds that, in addition to being unable to carry on their legitimate business, or not carrying on their legitimate business, they are also carrying on a business that is illegitimate. Upon that ground I come to the conclusion that, though the argument addressed to me is one applicable in a great many cases, it does not apply to a case where the company is not carrying on, cannot carry on, and has abandoned its legitimate business, and it is only doing business that is outside its powers. Under those circumstances, the conclusion I come to is, that the shareholder has established his right to have the company wound up.

A great many matters have been discussed before me, and other points have been raised which I do not intend to go into at all. I find that the ground upon which I am deciding the case is one specifically put forward by the petition itself; and I find also that the last paragraph of the affidavit of the Petitioner runs thus: "I am advised, and verily believe that it is just and equitable, that this company should be wound up by this honourable Court; that the main objects of the company have failed; and that unless the company is so wound up the uncalled capital of the shareholders will, when paid, be employed in carrying on a business other than a legitimate banking business." That is put forward as a summing-up of his case (though I agree it does not include the whole of his case), which I consider the legitimate ground for asking that the company should be wound up.

[After referring to matters not affecting the law of the case, his Lordship proceeded:—]

I cannot say that I look very favourably upon the conduct of the company. The case is one in which, in my opinion, the business which was contemplated, and with regard to the carrying on of which the shareholders were invited to come in and were requested to pay calls, has come to an end, and the Petitioner is entitled to have the company wound up.

May 6. *Everitt*, Q.C., for the Company and the Shareholders and creditors who had appeared in opposition to the Petition:—

An arrangement has been made, subject to the sanction of the

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Court, that two of the shareholders who wished the company to go on, should, out of their own moneys, purchase all the shares of the twelve persons who supported the petition, and take transfers of those shares, and that the petition should thereupon be withdrawn, and that the sum of £100 which had been paid in by the Petitioner should be paid out to the company in respect of the calls due on the Petitioner's shares. We ask that the petition may be dismissed, notwithstanding that minutes for the winding-up have been delivered out, but not passed or entered. *In re St. Nazaire Company* (1) is an authority that the Court has jurisdiction to rehear the petition, the order not having been perfected.

Napier Higgins, Q.C., *Duke*, and *Fred Wood*, for the Petitioner; and

Bramwell Davis, for the shareholders who supported the petition, consenting to the proposed arrangement.

NORTH, J.:—

On the authority of the case cited, and *In re Suffield* (2), I think I have jurisdiction, and by consent will dismiss the petition.

The order made (omitting formal parts) was as follows:—

"And it appearing that minutes have been delivered out for the winding-up of the above-named company, pursuant to the order of this Court on the 1st of May, 1890, and counsel for *Charles Blinco* and *Henry Jones Patrick*, two of the shareholders, opposing the said petition on the days hereinbefore mentioned by their counsel, alleging that they, out of their own moneys, satisfied the said Petitioner and contributories supporting the said petition, and the said *Charles Blinco* and *Henry Jones Patrick*, by their counsel, agreeing to take transfers of the shares of the said Petitioner and shareholders supporting as aforesaid, and the Petitioner, by his counsel, asking to withdraw his petition, and all the Respondents, by their counsel, consenting, this Court doth order that the said petition do stand dismissed.

"And it is ordered that the funds in Court be dealt with as directed in the schedule hereto."

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(1) 12 Ch. D. 88. (2) 20 Q. B. D. 693.

The schedule related to the £100 paid in by the Petitioner. The payee named in the schedule was the *Crown Bank.*

Solicitor for the Petitioner: *C. Curtis.*

Solicitor for shareholders supporting: *C. Steele.*

Solicitor for the company and shareholders opposing: *Godden Hare.*

Solicitor for creditors opposing: *G. Lincoln.*

D. P.

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In re O'MALLEY.

NORTH, J.
1890
April 30; *May* 1.

Contempt of Court—Newspaper comments on pending Proceedings—Fine.

Comments were made in a newspaper on a pending petition by a shareholder to wind up a banking company; with reference to an intended cross-examination of directors it was said, "if they are compelled to make a full statement of the affairs of the bank we shall have some interesting revelations." Previously to the presentation of the petition a series of articles calling in question the conduct of the directors had appeared in the newspaper. The Court found that the articles had been instigated by the petitioning shareholder.

On motion to commit the publisher of the newspaper for contempt of Court, he was ordered to pay a fine of £50 and costs.

THIS was a motion on behalf of the *Crown Bank* (*Limited*) that Mr. *William O'Malley*, the publisher of the *Star* newspaper might be committed to prison for publishing in the *Star* newspaper of the 21st of April, 1890, a certain paragraph while a petition to wind up the bank was pending. The petition was brought by Mr. *Buckley*, a shareholder, and had been ordered to stand over in order that the chairman of the bank, and Mr. *Gilpin*, another director, might be produced for cross-examination at the hearing of the petition. The paragraph was as follows:—

"The *Crown Bank*—Letting light in.

"We have respectfully directed attention to so-called bank, and we have not hesitated to describe it as a fraudulent concern. Neither Mr. *Gilpin*, nor any other person connected with it, has thought fit to challenge that description, and we observe with much satisfaction that the matter has now come before the

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Courts. On Saturday a petition for winding-up the bank was discussed in Mr. Justice *North's* Court. The petition is ordered to stand over until next Saturday, when the chairman of the bank and Mr. *Gilpin* are directed to attend for the purpose of being examined. If they are compelled to make a full statement as to the affairs of the bank we shall have some interesting revelations."

Previously to the presentation of the petition for winding-up articles had appeared in the *Star* newspaper in reference to the *Crown Bank* on the 22nd, 23rd, 28th, 29th, 30th and 31st of January, and the 20th of February, respectively. These letters contained statements and comments unfavourable to the company and its directors. They were written, as the Judge held, on information supplied by Mr. *Buckley*, the shareholder who was petitioning to wind up the company.

Mr. *O'Malley*, the publisher of the *Star*, made an affidavit in defence, which, after reference to the earlier paragraphs in the *Star*, was as follows:—"No objection was ever made to the publication of the said remarks until this notice of motion was served. The said remarks were published in the public interest, and without any crooked or malicious motive, and the object of the remarks complained of was simply to draw the attention of the public to the proceedings about to take place in Court, and without the smallest intention of prejudicing or assisting either the Petitioner or the Respondents, or in any way interfering with the course of justice, or prejudicing the fair hearing of the petition. I was not in the least aware that in publishing the remarks complained of I might be committing a contempt of this honourable Court, or that the publication of those remarks stood on a different footing from that of the others of which I regarded these as a mere continuation. But, if this honourable Court should be of opinion that in such publication I have committed a contempt, I desire to express my deep regret for the same, and to offer to the Court a most humble apology for the offence which I have unwittingly committed."

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the motion:—

The conduct of the *Star*, for which the Respondent is respon-

sible, comes within the principle in which the Court will commit a person to prison for publishing, pending litigation, matter that tends to prejudice a fair trial: *Tichborne* v. *Mostyn* (1); *In re Cheltenham and Swansea Railway Carriage and Wagon Company* (2), a case like this of a winding-up petition. It is clear that the author of the articles in the *Star* has been inspired by the Petitioners.

Wurtzburg, for the Respondent:—

The Court is slow to exercise the extraordinary jurisdiction it has in the matter of contempt of Court. And where a person has been guilty of a technical contempt of Court—has not acted perversely, or so as really to do any harm—the Court will not make an order against him. In this case, where the trial is before a Judge and not a jury, the result of the proceedings could not be influenced by newspaper comments: *Metropolitan Music Hall Company* v. *Lake* (3); *Plating Company* v. *Farquharson* (4).

Cozens-Hardy, in reply.

May 1. NORTH, J. (after stating the nature of the motion, reading the paragraph that appeared in the *Star* of the 21st of April, parts of the paragraphs that appeared on the 22nd and 23rd of January, and so much of the Respondent's affidavit as is set out above, continued):—

No one can read the paragraphs that appeared in the *Star* previously to the presentation of the petition without seeing that the editor was put in motion by the Applicant, and that he was not expressing the independent opinion of an impartial newspaper, but was taking a part which he knew to be that of one side against the other. So far, however, as the earlier paragraphs published before the petition was presented are concerned, their publication might be the subject of an action for libel, but could be no contempt of Court. But when, with notice that the petition had been presented, the newspaper deliberately took one side in the controversy, and took on itself to foretell what the

(1) Law Rep. 7 Eq. 55, n.
(2) Ibid. 8 Eq. 580.
(3) 60 L. T. (N.S.) 749.
(4) 17 Ch. D. 49, 54.

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result would be, in my opinion there was a gross contempt of Court. It was doing what might interfere with the course of justice. Whether it actually would so interfere in any case, I do not know. Whether there is any person with a mind so constituted that he would be influenced by such a paragraph in a newspaper of this sort I cannot tell. The only object for which such a paragraph could be inserted must be to influence persons who might read it, and induce them to take one side. It was not, therefore, an impartial statement—even if that could be allowed—but it was a deliberate adoption of the view of one of the parties. I do not think it necessary to refer at length to the two authorities cited in support of the motion. I will take a passage cited in both, from an earlier decision by Lord *Hardwicke*: *Roach* v. *Hall* (1), in which he said:—"Nothing is more incumbent upon Courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced."

That view has both before and since always been taken by the Courts, and, in my opinion, ought to be acted upon in this case. The case before me is one entirely different from the cases relied upon by Mr. *Wurtzburg*, such as where a newspaper had inadvertently admitted advertisements, being ignorant of the existence of legal proceedings; which have no application to a case where what is done is done deliberately.

Under the circumstances, in my opinion, there has been a gross contempt of Court, and I should send the publisher to prison if it were not that I do not wish to give him the prestige which some foolish persons would attach to a man upon whom such a sentence is passed. I order him to pay a fine of £50, and the costs of these proceedings as between solicitor and client.

Whatever the conduct of the company may have been in other respects, I think that they were quite right in bringing this matter before the Court.

(1) 2 Atk. 469.

MINUTES OF ORDER:—And this Court being of opinion that the said *William O'Malley* has committed a contempt of this Court in publishing in the said *Star* newspaper of the 21st day of April, 1890, a certain paragraph headed, "The *Crown Bank*—Letting Light in," and describing the *Crown Bank, Limited*, as "a so-called bank," and "a fraudulent concern"; and stating that the examination of the chairman of the bank and Mr. *Gilpin* upon the pending petition would result in interesting revelations, doth order that the said *William O'Malley* do pay to Her Majesty the Queen a fine of £50, and do pay to the said *Crown Bank, Limited*, their costs of this motion as between solicitor and client, such costs to be taxed by the Taxing Master.

Solicitor for the Applicants: *Godden Hare.*

Solicitors for the Respondent: *Shaen, Roscoe, Massey & Co.*

D. P.

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1890
Feb. 6.

In re SMITH.
KEELING *v.* SMITH.

[1889 S. 2689.]

Will—Construction—Marriage with Consent of Trustees.

A testator bequeathed residuary personal estate in trust for his son during his life or until his marriage, and from and after his marriage "with the consent of at least two of the trustees for the time being" in trust for his son absolutely. After the testator's death his son made a verbal request to the trustees of the will for their consent, and they desired him to make his application in writing. The son then applied in writing for their consent; and the trustees replied that they were prevented from taking any action, as they had been told that the lady had declined his proposal. The marriage took place, and in the course of proceedings to determine the question whether there had been a consent within the terms of the bequest, the trustees deposed that at the time of the son's verbal application they had no objection to the marriage, but were of opinion that it was not at that time desirable:—

Held, that the consent of the trustees had been substantially given within the principle of *Daley* v. *Desbouverie* (1), and that the son was absolutely entitled to the residuary personal estate.

ADJOURNED SUMMONS.

Theophilus Smith, by his will dated the 11th of December, 1882, after appointing *G. R. Keeling*, *J. Trevarthen*, and *J. Tann* to be executors and trustees thereof, and bequeathing certain pecuniary and specific legacies, devised and bequeathed all the residue of his real and personal estate to his said trustees upon trust for sale and conversion, payment of debts and legacies and investment, and declared that his trustees should hold one moiety of the trust fund and the income thereof upon trust to pay the income arising therefrom to his son *H. W. Smith* by quarterly instalments without power of anticipation during his life or until his marriage; and the testator then continued: "And from and after the marriage of my said son with the consent of at least two of the trustees for the time being thereof, then I declare that my said trustees or trustee shall stand possessed of the said moiety or equal part in trust for my said son absolutely."

The will also contained a proviso that, if the testator's said

(1) 2 Atk. 261.

son should die without having been married, his trustees should stand possessed of such income and of the investments representing the same upon the trusts declared concerning the other moiety.

The testator died on the 22nd of December, 1882. His son *H. W. Smith* survived him, and on the 2nd of March, 1885, was married to Mrs. *Elizabeth Harris.*

The question was whether he had made this marriage with the consent of at least two of the trustees of the testator's will; and this was an originating summons taken out by the trustees under Order LV., rule 3, sub-s. (*a*), against *H. W. Smith* and the persons beneficially entitled to the other moiety of the testator's residuary estate, asking the Court to determine whether the Defendant *H. W. Smith* was now absolutely entitled to the moiety of the trust fund in question, or who were now entitled to the same and the income thereof, and in what shares and for what interests.

The evidence upon the question was comprised in an affidavit by two of the trustees, Messrs. *J. Trevarthen* and *J. Tann*, and an affidavit by Mr. *H. W. Smith.* The third trustee, Mr. *G. R. Keeling*, was, it was stated, in bad health and unable to give evidence. In their affidavit the two trustees deposed as follows:—

Paragraph 9. "Speaking positively as to ourselves and to the best of our knowledge, information, and belief as to the said *G. R. Keeling*, we say—none of us gave any consent to the said marriage of the Defendant *H. W. Smith*, unless a consent thereto is to be inferred from the circumstances hereinafter stated; but we have never refused to give our consent to the marriage. We have not any objection to the marriage, and at the time when the Defendant *H. W. Smith* applied to us as hereinafter mentioned we had no objection to the lady. We were of opinion, however, that it was not at that time desirable that the said Defendant should marry, or should be put in possession of the capital of his share under the said testator's will. We were not aware that if the said Defendant married without consent the trust for payment of the income to the said Defendant might be affected, or that it was requisite that the consent should be given before the marriage. We did not consult our solicitor or have any legal advice upon the matter until some time after the marriage."

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Paragraph 12. "On or about the 20th of December, 1884, the Defendant *H. W. Smith* attended one of our periodical meetings as such trustees as aforesaid at the *Greyhound Hotel, Croydon*, and received a cheque for the income then due to him, and stated that he contemplated marrying the said *Elizabeth Harris*, and asked for our consent thereto, and we desired him to make his application in writing."

As to this meeting, the Defendant *H. W. Smith* in his affidavit desposed as follows: "Paragraph 12 of the same affidavit does not fully give an account of what occurred at the interview therein referred to. The Plaintiff *G. R. Keeling*, on the occasion therein mentioned, said to me, after I had asked the trustees for consent to my marriage, 'We see no objection, but we should like you to make your application in writing,' leading me thereby to suppose that the writing was merely a matter of form."

In consequence of this interview, the Defendant, *H. W. Smith*, on the 5th of January, 1885, wrote and sent to the trustees a letter in effect asking them to consent to his marriage, and on the 13th of January, 1885, the trustees replied as follows:—

"Dear Sir,—We have received your letter of the 5th, but are prevented for the present from taking any action in the direction you have requested us to do by the fact that the lady whose name you have mentioned told Mr. *Keeling* not very long since that she had positively declined your proposal to marry her. . . . .

"We are, dear Sir,

"Yours faithfully,

"*George R. Keeling*,
"*John Trevarthen*,
"*John Tann*, jun."

There was some further immaterial correspondence, and the marriage took place as above-mentioned on the 2nd March, 1885.

Gregson, for the trustees.

Hastings, Q.C., and *Eastwick*, for the Defendant *H. W. Smith*:—

Upon the evidence the trustees did in substance give their

consent; and as this is not a case in which the testator has specified any particular mode in which the consent of the trustees is to be given, no formal consent need be shewn: *Berkley* v. *Ryder* (1); *Creagh* v. *Wilson* (2); *Mesgrett* v. *Mesgrett* (3); *Daly* v. *Desbouverie* (4); *Reynish* v. *Martin* (5); *Burleton* v. *Humfrey* (6); *Clarke* v. *Parker* (7); *Harvey* v. *Aston* (8).

At all events the trustees never disapproved of the marriage itself or refused their consent to it, and must be taken to have given a tacit consent.

Buckley, Q.C., and *F. H. Colt*, for the persons beneficially interested in case Mr. *H. W. Smith* should die without having been married:—

To entitle the son to an absolute interest in a moiety of the testator's residuary estate, there must be a marriage with a prior consent of at least two of the trustees of the will. There never was any such prior consent either active or tacit, and this for the reasons which the trustees have given. In *Berkley* v. *Ryder*, Lord *Hardwicke* says that in all the cases of implied consent there had been evidence of a previous "approbation" of the marriage, and this element, which runs through all the authorities, is absent here.

In *Daley* v. *Desbouverie*, which has been much relied on, there was what amounted to an active present consent.

STIRLING, J.:—

The question I have to decide is whether the son has married with the consent of at least two of the trustees for the time being, and so has become entitled to a moiety of the testator's residuary estate.

It is first of all to be observed that on the face of the will no particular form or manner in which the consent is to be given has been prescribed by the testator. It is enough that there should be the consent of two of the trustees for the time being.

(1) 2 Ves. Sen. 533.
(2) 2 Vern. 572.
(3) Ibid. 580.
(4) 2 Atk. 261.
(5) 3 Atk. 330.
(6) Amb. 256.
(7) 19 Ves. 1.
(8) 1 Atk. 361.

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I also observe that from an early period the Court, in dealing with cases of this kind, has treated the consent to be given to the marriage as a matter, not of form, but of substance, and where it has been found that substantially the consent has been given, it has not looked very minutely into the form which the consent has taken.

There is perhaps no case which shews this more strongly than *Daley* v. *Desbouverie* (1), which was decided so far back as the year 1738 by a very great judge, Lord *Hardwicke*. In that case Lady *Ann Burke* was entitled under a deed of appointment to certain freehold estate in remainder; but in case she should marry without the consent of the trustees of the deed, Sir *Edward Desbouverie*, *John Manley*, and *Thomas Ward*, or the major part of them, she was to forfeit all her right to the property, which in that event was to go over to the person next entitled in remainder. In 1734 a treaty of marriage was proposed between Lady *Ann* and Mr. *Daley*, who acquainted Sir *Edward Desbouverie* with his intentions, and made a proposal for a settlement. A meeting of the trustees was then held, at which they agreed not to consent unless the proposed settlement was altered in a particular way. Then Mr. *Manley*, at the request of the other trustees, transmitted the proposal by letter to Mr. *Taylor*, who was the guardian of the Earl of *Clanricarde*, Lady *Ann's* brother. The letter commenced as follows: "We take the liberty to give you some further trouble in relation to Lady *Ann*, who we find has an inclination to marry the son of Mr. *Dennis Daley*; the young gentleman has sent the enclosed proposals to Sir *Edward Desbouverie*. As we are entire strangers to Mr. *Daley*, we desire you may inquire into his circumstances, and how far he is able to make the settlement proposed by his son, and if his father should desire to treat, it is our opinion my lord's counsel should be consulted thereupon." Then followed a description of Lady *Ann's* fortune, and the letter continued as follows: "This is all the influence we have over Lady *Ann*, and she might with her fortune marry much better; yet, if Mr. *Daley's* father will make the settlement proposed, we believe the young folks are too far engaged for us to attempt to break off the match, and therefore

(1) 2 Atk. 261.

we shall be obliged to consent to it." That letter was signed by *Manley* only, but it contained a postscript to the effect that the letter was prepared for all the trustees to sign, but that Sir *Edward Desbouverie*, going out of town in a hurry, had desired Mr. *Manley* to forward it. That letter does not in terms express any present consent, but only an intention to give a future consent upon certain terms. Mr. *Daley's* father was willing to make a settlement, though not precisely in the terms proposed by the trustees, and after some negotiations, which did not come to anything, Lady *Ann* and Mr. *Daley* were married secretly on the 5th of June, 1735, at the *Fleet*, by *John Gaynam*, the *Fleet* parson; and the question whether that was a marriage with consent came before Lord *Hardwicke* for decision; and his Lordship, in deciding that the marriage was substantially with the consent of the trustees, towards the end of his judgment expresses himself in this way (1): "It is manifest both from the letter and disposition of Mr. *Manley*, one of the trustees, that he agreed to the proposal and gave his consent that it should be a match; and the letter is likewise evidence that the trustees in general approved of the person, behaviour, and quality of Mr. *Daley*; and it is also evidence of their consent to the marriage, provided Mr. *Daley*, the father, will make the settlement he proposed. The words in the letter, 'We shall be obliged to consent' mean from the necessity of the thing and for the happiness of the lady, and ought to be construed a present consent, that, if the father would make the settlement, they would not break the match . . . . The trustees have signified their consent that a settlement should be made according to the prayer of the Plaintiff's bill. And therefore I will decree accordingly."

Now I cannot find that that case has been in any way overruled. On the contrary, in *Clarke* v. *Parker* (2), Lord *Eldon* was not at all inclined to depart from it, because in the very last paragraph of his judgment he says: "There are so many cases in which the Court has thought itself at liberty to conceive consent to have been given substantially, though not in terms, that I do not think it right to decide this case without directing inquiries, with a view to bring fully before the Court matter, which

(1) 2 Atk. 265. (2) 19 Ves. 1, 24.

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is in some degree before it." The matter there referred to related to the question whether a substantial consent could be inferred from the acts of one of the trustees who had not given any formal consent. That, therefore, is the principle on which I ought to deal with the present case.

[His Lordship then dealt with the evidence, and as to the 9th paragraph of the trustees' affidavit said:—] That paragraph shews that to the marriage in itself the trustees had no objection, although they were of opinion that at present it had better not take place—that is to say, they stood very much in the same position as the trustees in *Daley* v. *Desbouverie* (1), and amounts to this—"We consent, provided the marriage takes place at the proper time."

[His Lordship then referred to the letter of the 13th of January, containing the answer of the trustees to the formal application of the 5th of January, 1885, and after expressing his opinion that the letter merely amounted to a statement on the part of the trustees that, inasmuch as the lady had no intention of marrying Mr. *Smith*, it was unnecessary for them to give any formal consent, he concluded as follows:—]

It is said that the evidence shews that the trustees never considered the matter, and never really gave their consent. I do not so read it. They did consider the substance of the matter—they considered the question whether the marriage was a suitable one, and they came to the conclusion that it was; but they attached to that the proviso that it should took place at the proper time. That appears to me to bring the case within the principle of *Daley* v. *Desbouverie*. I, therefore, hold that the consent of the trustees has been substantially given, and that the son is entitled absolutely to a moiety of the testator's estate.

Solicitors: *Wynn-Baxter & Keeble*, agents for *J. S. Streeter, Croydon*; *Prior, Church, & Adams*, agents for *Drummonds, Robinson, & Till, Croydon*; *H. Tyrrell & Son*, agents for *J. M. Head, Reigate*.

(1) 2 Atk. 261.

W. W. K.

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Feb. 28; *March* 1, 7.

[1890 B. 663.]

Proprietary Club—Member no right of Property—Expulsion of Member by a Committee—Irregularity of Proceedings by Committee not properly constituted—Damages and not Injunction.

In the case of an ordinarily constituted club, in which members have rights of property, a member whose rights have been interfered with by the committee is entitled to ask the Court to consider whether the rules of the club have been observed; whether anything has been done which is contrary to natural justice; and whether the decision complained of has been come to *bonâ fide*; but in the case of a proprietary club, in which members have no right of property, a member who has been expelled by a committee, though the proceedings were irregular, cannot obtain relief by way of injunction, but will be left to obtain it in damages.

Appeal of the Plaintiff dismissed, on his own application, with costs.

THIS was a motion on behalf of Mr. *George Alexander Baird* for an injunction to restrain the Defendants, Messrs. *Wells* and *Raleigh*, the proprietor and secretary of the committee respectively of the *Pelican Club* from interfering with his use and enjoyment of the club as a member thereof. The *Pelican* was a proprietary club, established in 1887, and the Plaintiff became a member of it soon after it was formed. There were original rules to the effect that the club should be strictly proprietary; that general meetings for the election of a committee should be held in October or November in each year; proper notice of fourteen days clear being given to the members; that the committee should consist of not more than twenty-one members; that the proprietor should be an *ex-officio* member, but not qualified to vote; that special meetings might be called; that members should be elected by the committee; that the subscription should be fixed from time to time; and that the rules should be printed and binding upon the members. The material rules were the 7th, which stated that the "Resolutions to be proposed at special or ordinary meetings shall be given notice of in writing a clear week previous to the meeting," and the 17th, which was that "any member whose conduct in or out

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of the club shall be unbecoming a gentleman, in the opinion of the committee, or with respect to whom any matter may have transpired which might be calculated to render his continued membership of the club injurious to its character or interests, shall, if the committee on inquiry find the same to be substantiated, be requested to resign; and in the case of his non-compliance, he shall be subject to expulsion." On the 29th of October, 1887, the first general meeting was held. In the year 1888 there was no general meeting. The evidence of the Defendant *Raleigh* was that the committee early in December, 1888, consisted of only twelve members, and that on the 6th of that month eight gentlemen and himself were appointed to act upon the committee of the club for the purpose of filling up the vacancies which had arisen. Shortly afterwards there was a proposal made for new rules, and the secretary was directed to call a general meeting for the 2nd of April, 1889. The secretary accordingly issued a notice, dated the 13th of March, 1889, convening a general meeting; but the notice in no way stated the matters which were to be taken into consideration at the meeting as required by the 7th rule (*supra*). The meeting was held, and the following resolutions were carried: "That the election of the then present committee be confirmed; that the elections and work of the committee be confirmed"; and then the rules were read and amended, and finally confirmed. The new rules contained numerous material alterations of the old rules—in particular, the size of the committee was increased and the mode of election altered, while the former 7th rule was entirely omitted.

On the 23rd of December, 1889, a prize-fight took place at *Bruges*, in *Belgium*, between two pugilists named *Smith* and *Slavin*, at which the Plaintiff was present, and it was alleged that certain unseemly proceedings occurred in which one of the officials of the club was, as alleged, implicated. On the 24th of December, 1889, an investigation by the committee into the conduct of that official was commenced and prosecuted. In the course of the investigation charges were made against the Plaintiff by some of the persons examined; and in particular he was charged with having hired "roughs" who were present at the fight, and with having used violent and abusive language towards

Slavin. On the 30th of December, 1889, a letter was sent to the Plaintiff summoning him to attend before the committee on the 7th of January, 1890. In reply to it the Plaintiff wrote and addressed to the chairman and members of the committee the following letter, which he handed to the secretary on the 7th of January:—

"My Lord and Gentlemen,—I attend at your request before you to-day in order to answer any question that you may put to me touching my conduct in connection with the late fight between *Slavin* and *Smith.* I point out to you the great loss and damage that would accrue to me socially and otherwise if an adverse decision is arrived at upon a hasty and partial investigation, and I request that before arriving at any such decision I may be supplied with an accurate statement of the complaint that you make against me, that I may examine into the same with a view of ascertaining the true facts and placing them before you. I may add that I have not, either directly or indirectly, done anything that necessitates an inquiry into my conduct."

The Plaintiff was examined before the committee. He made admissions as to his conduct at the ring-side, but expressly and emphatically denied that he had hired the "roughs." He did not, however, express any wish to call witnesses. The committee acquitted the Plaintiff on the charge of hiring "roughs," and resolved that his language, although unbecoming that of a gentleman and a member of the club, and consequently deserving of regret, was not such as in their judgment to call for the application of the 17th rule.

On the 8th of January, 1890, the general meeting of the club was held at which, from what took place, it was evident that the conclusion of the committee did not meet with the approval of all the members of the club, and in particular of the Marquis of *Queensberry*, who objected to them. He stated, that although he did not wish to find fault with the action of the committee he must say that fresh evidence had reached them on the previous day, and he was of opinion that sufficient time had not been given to the matter so far as it concerned Mr. *Baird*, and therefore he moved, "That the examination into Mr. *Baird's*

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conduct should be re-opened, and continued by the committee from the point it left off." An amendment was proposed, "That the conduct of Mr. *Baird* be referred back to the committee for further consideration, and that they be instructed to report to a general meeting to be convened one month from this date." That amendment was, as the evidence shewed, after considerable discussion, carried. At that meeting the chairman briefly stated that the committee had resolved to resign in a body, and that a general meeting would be called in a fortnight's time to elect a "better lot." The report of the proceedings which was in evidence did not state that the meeting was adjourned, but a notice of an adjourned meeting was posted at the club and sent to every member. On the 22nd of January, 1890, the meeting was held, and the minutes shewed that a proposition that the old committee be invited to return to office *en bloc* was seconded and carried unanimously. That committee proceeded to deal further with the case against the Plaintiff, and at a meeting of the committee held on the 29th of January, 1890, it was, according to the minutes, resolved, "That in view of the report made by the committee to the general meeting, and of the vote of the members thereon, Mr. *G. Baird* be requested to resign his membership of the club in conformity with rule 17"; and on the 10th of February, 1890, the committee met again and passed a resolution expelling the Plaintiff from the club. The Plaintiff thereupon brought this action for an injunction, as above stated. Further facts and evidence appear in the judgment.

Sir *Charles Russell*, Q.C., and Sir *Horace Davey*, Q.C. (with them *Ernest de Witt*), for the Plaintiff:—

There have been many cases in which a question of this kind has arisen. The decisions in *Fisher* v. *Keane* (1), and *Labouchere* v. *Earl of Wharncliffe* (2), are clear that in expelling a member from a club the committee must shew that they have in carrying out the rules acted in accordance with the ordinary principles of justice; and if they exercise their powers they must shew that they have been duly constituted a tribunal for the purpose, and have proceeded properly. A man who has by contract left his

(1) 11 Ch. D. 353. (2) 13 Ch. D. 346.

character in the hands of a committee has a right to see whether they have acted properly. The evidence here is that the committee were not legally constituted; that the election or nomination in December, 1888, was improper, and that the committee did not proceed in the matter with due formalities. The resolution for expulsion was passed without giving the Plaintiff an opportunity of explaining his conduct, or of defending himself against the charges made in reference to it. The Plaintiff has paid his subscription for this year, and by his contract he has purchased the right to use the rooms and premises and conveniences attaching to the club, and his complaint is that he has been deprived of that right. The right is, of course, subject to the rules, and if they authorize expulsion for any cause they must be strictly complied with. The rules as amended are invalid, having been irregularly agreed to. Charges of a serious character, in reference to the prize-fight in *Belgium*, were made against the Plaintiff; but the club committee, so called, which sat on the 24th of December, did not consider it necessary to ask the Plaintiff to attend before them on that occasion to answer any question which might be put to him. He did, however, on request, attend the committee on the 7th of January, 1890, and after hearing him they passed a resolution which, while regretting his conduct, exculpated him from the charges made against him. Assuming that that committee was a competent tribunal, having passed that resolution, there was an end of the matter. What took place subsequently at the meetings of the self-appointed committee was invalid on every possible ground. It was not an elected committee of the club, and it is submitted that upon the plainest principles of justice, even if it had been, it was the bounden duty of those gentlemen who formed the committee and dealt with another person's character to give him notice that the charges made against him upon the statement which the Marquis of *Queensberry* had brought before them would be re-opened and considered. But that course was not taken, and a resolution was passed calling upon the Plaintiff to resign—a preliminary step towards expulsion—which was indeed effected by a resolution passed on the 10th of February, 1890. The action of the committee, so called, was *ultrà vires*. The committee of December,

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1888, was incompetent, and had no jurisdiction; yet they heard the case, and exonerated the Plaintiff from the graver charges made against him. The committee not having been duly constituted, it was a club without a committee. If the committee which returned to office *en bloc* were properly constituted they could not review the decision come to on the 7th of January, 1890. The committee have not acted in a spirit which ought to have guided them in making a fair and judicial inquiry, and the Plaintiff is entitled to the relief which he asks.

Hastings, Q.C., and *Levett*, for the Defendants:—

It is submitted that the Court has no jurisdiction to entertain the application, the *Pelican* being a proprietary club. The cases which had been referred to were of clubs where the members were partners, as at the *Reform Club*, and as such they were entitled to property in the club, and which was vested in trustees for their use. It is upon that ground only that the interference of the Court can be sought. The right of property is the foundation of the jurisdiction, and the Plaintiff has in this club no property at all; everything is vested in the Defendant *Wells*, and he is the holder of the licenses. The Plaintiff had only the right, subject to the rules, to use this proprietary house, or certain rooms in it, for a certain period, by paying a subscription. He had a mere license to enter the premises, and if improperly interfered with might have made a claim for damages, but he has no right to ask for an injunction: *In re St. James's Club* (1); *Hopkinson* v. *Marquis of Exeter* (2); *Rigby* v. *Connol* (3); *Lyttelton* v. *Blackburne* (4); *Millican* v. *Sulivan* (5); *Wood* v. *Leadbitter* (6).

But assuming there is jurisdiction, then the Plaintiff's case was brought before a tribunal which could try it. It was a *de facto* committee, which had existed from the 2nd of April, 1889, and whether the meetings were properly called and the notices of business properly given are beside the question. Before that committee the Plaintiff was summoned and was heard and his

(1) 2 D. M. & G. 383–387.
(2) Law Rep. 5 Eq. 63–66.
(3) 14 Ch. D. 482.
(4) 45 L. J. (Ch.) 219–223.
(5) 4 Times L. R. 203.
(6) 13 M. & W. 838.

case inquired into, and they came to a conclusion. The Plaintiff had a fair trial before the committee. He had an opportunity to call witnesses, but did not call one. He took the whole matter *pro confesso* without a word of protest. He did not object to the jurisdiction of the committee, and after all that he cannot now say that the committee was not properly elected, and it is not for the Defendants to prove that they were. It was a question for the committee, and considering the facts proved they were justified in putting into operation rule 17. The Plaintiff waived any irregularity if there was any, and he is not entitled now to ask the Court to grant him relief from the position in which he has been placed. Whatever mistakes there may have been, if any were made, it is submitted that the Court has no jurisdiction at all in this case, and ought not to interfere with the resolutions of the committee.

Sir *Horace Davey*, in reply:—

As to the question of jurisdiction. The observations of Sir *George Jessel* in the case of *Rigby* v. *Connol* (1) may be replied to by saying that no rooms were hired by the persons who met and played whist at each other's houses. It is not denied that the jurisdiction is founded on property; but it is submitted that the members of the *Reform Club* are not partners. They have no power to pledge each other's credit for goods supplied. There is no partnership in law. The decision in *Wood* v. *Leadbitter* (2) many persons thought was not the incarnation of human wisdom; but whether it was right or wrong it has nothing to do with this case, which is not, as in that case, and also in that of *Tayler* v. *Waters* (3), one of assault and trespass. In this case the Plaintiff had a contract with the Defendant *Wells* that, in consideration of the payment of entrance money, or annual subscription, so long as he continued to pay it, he should be a member, and be entitled to the use and enjoyment, in common with the other members of the club, of course subject to the rules, of the rooms and the furniture in them. It was a contract for the use and occupation of certain rooms, and it was none the less so because

(1) 14 Ch. D. 487. (2) 13 M. & W. 838.
(3) 7 Taunt. 374.

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the rooms were to be used and enjoyed in common with the other members. The Plaintiff was a tenant in common, but subject to this, that he had not a transmissible interest. Perhaps it was more like a joint tenancy; but whether the one or the other he had a right to use the rooms in common with others. That being the nature of the club, the case of *Rigby* v. *Connol* (1) has nothing to do with this case. Sir *George Jessel* there referred to a dozen or more scientific men agreeing to meet at each other's houses, and stated that if the association had no property, and took no subscriptions from its members, he could not imagine that any Court would interfere. If a whist club, consisting of a dozen persons, hired a room and paid a subscription, there would be a contract *inter se*, and each member would be entitled to attend and play at whist. Where, however, there is no subscription, there is no property of any species. Gentlemen who associate together as members of, and pay subscriptions to, what is called a club, are the occupants of a furnished house, and every one has a right to occupy it in common and to use the furniture and other conveniences so long as he is a member; so in this club the Plaintiff had as much right to occupy the rooms in it as persons have who hire furnished houses. If it were suggested that the Plaintiff claimed an interest in land which required a contract in writing, the answer would be that his contract was constituted when he paid his subscription and entered into possession, and having entered into possession he had the enjoyment of the rooms, and that was part performance, and therefore the *Statute of Frauds* has no application: *Maddison* v. *Alderson* (2). The difference between a proprietary and a club constituted in the ordinary way, is that in the latter the property is vested in trustees, and in the former it remains in the proprietor with a right in the members to the user of the rooms and the property in them so long as they are members of the club. The Plaintiff's contract with the proprietor was that he should be a member of the club so long as he paid his annual subscription, and be entitled to rights of occupancy of the property. It was part of his contract that the committee should act in accordance with the rules; and that they have not done;

(1) 14 Ch. D. 482. (2) 8 App. Cas. 467.

and it is difficult to see why the contract cannot be enforced by injunction. If this be a case for damages merely, which would probably be assessed at the amount of subscription; and not for injunction, that will put it in the power of any proprietor of a club to get rid of a member on returning his subscription—one party to a contract will be able to rescind it. It may be that for every time the member is turned out he can bring an action, and that at a moderate estimate may be a dozen a week. That will lead to a multiplication and circuity of actions, and that is a ground for granting an injunction. There is nothing in the nature of the contract which excludes the Court from granting an injunction for breach of it. The contract may extend over the present year, and so long as the Plaintiff pays his subscription, and on tendering the money his right will continue until properly excluded or he resigns. If the Plaintiff has no remedy by injunction, he really has none at all. Whether the contract was by the whole of the members, or an individual, with the Defendant *Wells*, it was one which gave the Plaintiff an interest in property and in the association—in the occupancy and use of the rooms of the club. It was contended that the Plaintiff was estopped from saying that the decision was not a good one because he made no objection, and that the committee was *de facto* before he waived the irregularities; but he could not waive them; he could not alter the rules and give the committee power to expel him. He could not alter the contract between himself and *Wells*. The Plaintiff, so long as he remains a member and pays his subscription, is not only entitled to the use of the rooms, but further, he will be liable to *Wells* for his subscription so long as he remains a member, and that will not cease, unless by death, expulsion, or resignation. If he said to *Wells* that he had been expelled, the answer would be, "It is no part of our contract that you should be expelled except by a properly constituted committee, and that has not been done." In fact, the Plaintiff did not waive any irregularity of the so-called committee. He was not made aware of any. He had had no information of the election of that committee, or of the incompetent way in which it had been constituted. The evidence shews that the new rules to be adopted upon the 2nd of

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April, 1889, and the notice of the business to be transacted on that day, were not sent to the members, but that a member might have a copy of the rules if he asked for it. It is clear that the Plaintiff did not waive his objections, and *Labouchere* v. *Earl of Wharncliffe* (1) is a conclusive authority in his favour. The committee returned to office with the original vice of its constitution—self-nominated in December, 1888, and not properly elected according to the rules; and so it continued on the 2nd of April, 1889. I deny that any members, or a majority, had any right to alter the rules, or to dispense with the rules which formed part of the contract. It is a serious matter where rules give a committee power to expel members—and hence the question of the constitution of this committee becomes a matter of grave substance. There was no submission by the Plaintiff to such a committee to adjudicate upon his conduct. But quite independent of the question of incompetency of the tribunal, the proceedings before the meetings and the committee were conducted in such a manner as not to entitle the Defendants to exclude the Plaintiff from the club, he having had no opportunity of explaining his conduct.

March 7. STIRLING, J.:—

This is a motion to restrain the Defendants from excluding the Plaintiff from the use and enjoyment of the *Pelican Club*, of which the Plaintiff was threatened to be deprived in consequence of a decision of the committee of the club. In cases similar to the present the Court, as has been repeatedly held, does not undertake to act as a Court of Appeal from the decisions of the committees of clubs: *Fisher* v. *Keane* (2); *Labouchere* v. *Earl of Wharncliffe*; *Dawkins* v. *Antrobus* (3). The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bonâ fide*. I propose to inquire into these matters in the first place, reserving for consideration hereafter a further question, viz., whether the decisions

(1) 13 Ch. D. 346. (2) 11 Ch. D. 353.
(3) 17 Ch. D. 615.

to which I have referred apply to a club constituted as the present is. [His Lordship having referred to the rules, the most material of which were the 7th and 17th, above set forth, and the evidence of the Defendant *Raleigh*, in reference to the filling up of vacancies on the 6th of December, 1888, continued:—] What was done on the 6th of December, 1888, and also the proceedings of the 2nd of April, 1889, were entirely irregular. If the election of the committee was to be confirmed, and new rules were to be adopted, proper and distinct notice should have been given to the members. No such notice was given, and consequently the proceedings were not binding on the members who were not present. Those proceedings took place in April, 1889, and the transactions complained of were in January, 1890. Were the acts of the meeting of the 2nd of April, 1889, assented to by the Plaintiff or other members of the club in the interval—a considerable interval—between the two dates? It was admitted by the secretary on cross-examination that copies of the new rules were not sent to the members, and there is no evidence that the Plaintiff knew what had been done, or assented to be bound by the new rules or by the acts of the committee so elected. I come now to the transactions which gave rise to the present proceedings. [His Lordship having stated them, continued:—] The statements made by the Plaintiff on the 7th of January, 1890, may be used as evidence against him. He has filed no affidavit upon this motion, and his counsel do not now seriously complain of the proceedings at that meeting. I think it may fairly be inferred from the account given by the secretary, in the absence of any other evidence, that the committee were justified in concluding that the Plaintiff was not prepared to dispute the substantial accuracy of the accounts given to them as to the language made use of by him at *Bruges*, and I also think that his admissions were such that if the committee had there and then resolved that the Plaintiff had rendered himself liable to the penalty imposed by the 17th rule, I could not have held that such a decision was other than *bonâ fide* in the sense in which those words are used in the cases on this subject. The committee, however, did not come to that conclusion. [His Lordship then read the finding and resolution of the committee, and

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proceeded :—] I understand that the committee acquitted the Plaintiff as to the charge of hiring "roughs"; and that they held that his language, although unbecoming that of a gentleman and a member of the club, and, consequently, deserving of regret, was not such as, in their judgment, to call for the application of the 17th rule, and to justify them in excluding him from the club. [His Lordship then referred to what took place on the 8th of January, 1890, set forth in the statement, and continued :—] I think that the meaning was that a new trial should take place. There was great confusion at the meeting, and the report is not clear as to what occurred, but according to the final paragraph the chairman stated, after the amendment had been carried, that the committee had resolved to resign in a body, and that a general meeting would be called in a fortnight's time to elect a "better lot." There was no formal adjournment of the meeting; but a notice of an adjourned meeting to be held on the 22nd of January, 1890, was posted at the club and sent to every member. On the 22nd of January a meeting was held, and at it the Marquis of *Queensberry* rose and expressed his regret that his resolution at the last general meeting should have come into conflict with the wishes of his brother committeemen. He proposed to make a statement with regard to Mr. *Baird*. It was then proposed that the election of a committee should be proceeded with, and a member proposed that the old committee should be invited to return to office *en bloc*, and that proposition was carried unanimously. It was that committee which proceeded to deal further with the case. If the proceeding on the 22nd of January was a new election it was irregular. The notice did not specify the object of the meeting, and it was not sent at a sufficiently early date—fourteen days' clear notice, according to the rule, was not given; for although the notice was posted at the club on the same day the circular to the members was not issued until the 11th of January, 1890. It was said, however, that the proceeding amounted merely to non-acceptance of resignation. There are difficulties as to that view, because at that meeting, according to the new rules, five members were to retire; however, I treat it in that way. Still the committee remained that which was elected on the 2nd of April, 1889, and, as I hold, irregularly elected.

Was its decision binding on the Plaintiff? All the cases lay down that the rules must be observed. It was held in the case of *Labouchere* v. *Earl of Wharncliffe* (1) that the decision of a meeting of which proper notice was not given according to the rules was not binding on the plaintiff, although he appeared before it without protest. That being so, it seems to me that the present Plaintiff cannot be bound by the decision of an irregularly elected committee. The rules of the club as to the election of a committee are certainly of not less importance than those which relate to the length of notice to be given of a general meeting; and I hold, on the evidence now before me, that the Plaintiff had no knowledge of and did not waive the irregularity. Subsequently, at a meeting of the committee held on the 29th of January, 1890, the Marquis of *Queensberry*, who had taken a prominent part at the meeting on the 8th of January, read a statement, of which his Lordship's notes have been put in evidence on behalf of the Plaintiff. He urged that the committee should inquire further into matters which had been mentioned prior to the 7th of January, but were not referred to on that day, on which alone the Plaintiff attended the committee. If that course, which seems to have been that intended by the general meeting, was to be taken, the committee were, in my opinion, bound to call the Plaintiff before them and give him an opportunity of answering the matter thus for the first time brought forward. The Marquis of *Queensberry* said, however, and I accept his statement, that the committee refused to do what he wished in that respect. What was done appears only in the minutes, and, according to them, it was resolved, "That in view of the report made by the committee to the general meeting and of the vote of the members thereon, Mr. *G. Baird* be requested to resign his membership of the club, in conformity with rule 17." It thus appears that the same committee which on the 7th of January came to the conclusion—and, as I must assume, *bonâ fide*—that the offence of which the Plaintiff was guilty did not call for expulsion from the club, determined on the 29th of the same month, without taking any further evidence and without hearing the Plaintiff, that the penalty imposed by rule 17 ought to be put in force against him.

(1) 13 Ch. D. 346.

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No member of the committee has made any affidavit explaining the grounds on which that conclusion was arrived at, and in the absence of such evidence I am not satisfied that the resolution of the 29th of January represents the fair and unbiased judgment of the committee. The Marquis of *Queensberry*, who, on the 8th of January, is reported to have stated that he was entirely satisfied with the result of the committee's inquiry, appears to have urged upon the committee that even if the Plaintiff did not hire the roughs who were present at the fight, he so acted as to render himself responsible for their conduct. That view of the Plaintiff's conduct was not dealt with in the report of the committee; it does not seem to have presented itself to that body on the 7th of January, and if it did not present itself to the committee it was hardly likely to occur to the mind of the Plaintiff. It is true that one question put to the Plaintiff, according to the evidence of the secretary, seems to shew that some attention was directed in that way; but notwithstanding that, upon the materials before me I think that that charge was not so formulated or so prominently brought forward on the 7th of January that it ought to be made the ground of the decision of the committee unless the Plaintiff had an opportunity of meeting it. The resolution of the 29th of January may be susceptible of another meaning. It is quite consistent with the terms of it that some members of the committee, or even the majority of them, may have adhered to their original opinion, but thought that they were bound to give effect to the general feeling of the members of the club as expressed in the vote of the following day. In my judgment, they could not be justified in so doing. The question was one for the decision of the committee who had heard the evidence, and not for a general meeting of the members who, as opposed to the committee, had not; and though the committee might take advice on the matter before them, they were bound to form and act on their own opinion. I do not forget that a further resolution was passed on the 10th of February, 1890. That was done under legal advice; and to that resolution, in the state of the evidence before me, I cannot attach any weight. In truth, however, it appears to be consistent with the prior resolution, and to be open to the same objections. I am, therefore, of opinion, first, that the decision

complained of was not that of a committee duly elected according to the rules of the club, and, secondly, that it is open to serious question whether the resolution of the 29th of January can be regarded as representing the unbiased judgment of the committee after fairly hearing the Plaintiff.

The question then arises, whether this case falls within the class of cases in which the Court grants relief by way of injunction. In all the cases of this nature, in which up to the present time an injunction has been granted, the club has been one of the ordinary kind, *i.e.*, it has been possessed of property (such as a freehold or a leasehold house, furniture, books, pictures, and money at a bank), which was vested in trustees upon trust to permit the members for the time being to have the personal use and enjoyment of the club-house and effects in and about it. But the interest of the members is not confined to that purely personal right. The members might, if they all agreed, put an end to the club; and in that case they would be entitled, after the debts and liabilities of the club were satisfied, to have the assets divided among them. In the present case the club, as such, has no property. The club-house and furniture belong to the Defendant *Wells*, and by him the subscriptions are taken. He is not a trustee, but the owner, of the property. If the club were dissolved at any moment there would be nothing whatever to divide among the members. Now the interference of the Court in the cases which have hitherto occurred has been based on the rights of property of which the member had been improperly deprived. The general principle was laid down by Lord *Cranworth* in the case of *Forbes* v. *Eden* (1), where he said (2): "Save for the due disposal and administration of property, there is no authority in the Courts of either *England* or *Scotland* to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs." And the same principle was stated at greater length by the late Master of the Rolls (Sir *George Jessel*) in the case of *Rigby* v. *Connol* (3). In that case the plaintiff sought to restrain the defendants from excluding him from the benefits of a trades union of which he was a member. Sir *George Jessel* said (4): "The first question

(1) Law Rep. 1 H. L., Sc. 568.
(2) Ibid. 581.
(3) 14 Ch. D. 482.
(4) Ibid. 487, 488.

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that I will consider is, what is the jurisdiction of a Court of Equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's Courts to decide upon the rights of persons to associate together when the association possesses no property . . . . I cannot imagine that any Court of Justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the Courts, as such, have never dreamt of enforcing agreements strictly personal in their nature . . . . in such cases no Court of Justice can interfere so long as there is no property the right to which is taken away from the person complaining. If that is the foundation of the jurisdiction, the plaintiff, if he can succeed at all, must succeed on the ground that some right of property to which he is entitled has been taken away from him. That this is the foundation of the interference of the Courts as regards clubs I think is quite clear." Then his Lordship referred to certain cases, and came to the conclusion that the plaintiff was not entitled to any relief.

Here, as I have pointed out, there are no funds vested in trustees or settled to be disposed of by the members of the *Pelican Club* in accordance with the rules of that association, and the question is whether the Plaintiff, as a member of that club, has any right of property for the protection of which the Court will interfere by way of injunction—and in my judgment he has not. The position appears to me to be this: each member is entitled by contract with the Defendant *Wells* to have the personal use and enjoyment of the club, in common with the other members, so long as he pays his subscription and is not excluded from the club under rule 17. That right is, as it seems to me, of a personal nature such as, if infringed, may give rise to a claim for damages, but not such as the Court will enforce by way of specific performance or injunction. The contract in its legal nature closely resembles contracts for providing board and lodging in a particular house, as when the head of a household admits

a boarder into his family for a fixed period, or the proprietor of a private boarding-house agrees to provide for a term, board and lodging for one boarder in common with others: as to which *Wright* v. *Stavert* (1) may be referred to. The contracts in these cases fall, in my opinion, under the head of agreements strictly personal in their nature, and consequently in neither of them would the Court interfere by way of injunction at the instance of the boarder. So also, in my judgment, is it in the present case. It was contended that damages might be an insufficient remedy by reason of a decision being given which affects the character and position in society of the Plaintiff and does not satisfy the requirements of the law. In no case, so far as I am aware, has the existence of such circumstances been treated as affording ground for the granting of an injunction to restrain the proceedings of a voluntary society, and indeed, upon the principle laid down in the case of *Forbes* v. *Eden* (2), it might well happen that decisions which gravely affect some members of a voluntary society and do not satisfy the requirements of the law, might be arrived at by the committee or other like body without being open to be questioned in any civil Court or giving rise to any right of action whatever. Under these circumstances, I make no order on the motion.

The Plaintiff appealed against the decision of Mr. Justice *Stirling*.

1890. April 23. Sir *Horace Davey*, Q.C. (Sir *C. Russell*, Q.C., and *Ernest de Witt*, with him), appeared for the appellant, and stated that, as the judgment of Mr. Justice *Stirling* had been in favour of the Plaintiff as regarded the irregularity of the proceedings of the Defendants, the Plaintiff had no wish to continue in the club, and would now assent to an order dismissing the appeal with costs.

Order made accordingly.

Solicitors: *Lumley & Lumley; Lewis & Lewis.*

(1) 2 E. & E. 721.

(2) Law Rep. 1 H. L., Sc. 568.

T. F. M.

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March 28; *April* 2.

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[1890. M. 764.]

Companies Act, 1862, *s.* 20 [*Revised Ed. Statutes, vol. xiv., p.* 207]—*Registered Company—New Company, Intended Registration of—Similarity of Names—Injunction granted to restrain Registration.*

A company, "*Madame Tussaud & Sons, Limited*," registered under the *Companies Act*, 1862, was granted an injunction to restrain the registration of a proposed new company, "*Louis Tussaud, Limited*," which was promoted by *Louis J. Tussaud* and friends, for the purpose of carrying on a similar business or exhibition to that of "*Madame Tussaud & Sons*," and in which *Louis J. Tussaud* was to be manager.

Whether, if *Louis Tussaud* had originally commenced and carried on business of a similar character in his own name and on his own account, and had taken partners, and as "*Louis Tussaud & Co.*" they had transferred the business and goodwill to a company, of which *Louis Tussaud* was to be a paid servant, that company would have been prevented by injunction from proceeding to registration of it under his name as a limited company, *quære.*

Semble, that *Louis Tussaud* could not for valuable consideration or otherwise confer on another person the right to use the name of *Tussaud* in connection with a business which he had never carried on and in which he had no interest whatever.

Order made in *Hendriks* v. *Montagu* (1), followed.

THIS action was commenced on the 4th of March, 1890, by "*Madame Tussaud & Sons, Limited*," against *Louis J. Tussaud.* The Plaintiffs by their writ claimed an injunction to restrain the Defendant from applying to the Registrar of Joint Stock Companies in *England* for registration under the *Companies Acts* of any company to be incorporated under the name of "*Louis Tussaud, Limited*," or any other name so nearly resembling the name of the Plaintiff company as to be calculated or likely to mislead or deceive the public into the belief that the company being incorporated as aforesaid, was the same as the Plaintiff company, and from issuing or publishing advertisements, circulars, or prospectuses representing that a company was to be incorporated pursuant to the *Companies Acts* under the name of "*Louis Tussaud, Limited*," or any such other name as aforesaid, and from

(1) 17 Ch. D. 638.

carrying on or commencing any business similar to the business of the Plaintiff company under the name of "*Louis Tussaud, Limited*," or any such other name as aforesaid.

This was a motion on behalf of the Plaintiff company that the Defendant might be restrained until the trial of the action or further order from applying or proceeding with any application to the Registrar of Joint Stock Companies, in the terms mentioned in the writ, and that the costs of the application might be costs in the action.

The business of the Plaintiff company consisted in carrying on the well-known exhibition of waxworks founded many years ago, according to one deponent as far back as 1802, by the late *Madame Tussaud*, and continued by her lineal descendants down to 1889, when the business was sold to Mr. *Poyser*, who subsequently transferred it to the Plaintiff company.

It did not appear that at the present moment of time any member of the family of the late *Madame Tussaud* was interested in the Plaintiff company's business. The evidence for the Plaintiff company shewed that their exhibition, though often, perhaps most often, referred to as "*Madame Tussaud's*," yet was not unfrequently spoken of as "*Tussaud's*" only. The Defendant *Louis Joseph Kenny Tussaud* was a young man in the 23rd year of his age, and a son of *Joseph Randle Tussaud*, who, with his two brothers, formerly carried on in *Baker Street*, and afterwards in the *Marylebone Road*, the exhibition now belonging to the Plaintiff company. The Defendant's evidence was, to the effect, that he had studied under his father in his business of a wax-modeller, had learned his business, and had assisted him in the modelling department of his business ever since he was thirteen years of age, up to 1889, when the business was sold to Mr. *Poyser*; that while he was employed assisting his father he himself modelled a number of figures at present exhibited in the Plaintiff company's exhibition; that he had never learned any other trade or business, and was dependent upon his profession of wax-modeller for earning his living, having no other means of subsistence; that he had for some months past been negotiating and arranging for a company to erect a building and open an exhibition of waxworks, of which he was to have the

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management, and that he succeeded in doing so in the early part of the present year; that the fact that the company was being negotiated was a matter of public notoriety, as it had been from time to time commented upon in the press all over the country; and that the arrangement he had made with the proposed company for the preparation of a waxworks exhibition for them, and for the management of the same, appeared in the prospectus of "*Louis Tussaud, Limited*"; in which it was stated that by arrangement with the company he had undertaken to pay all advertising and other expenses up to allotment; and he averred that a very large amount of money had been expended in connection with the bringing out of the company. He also averred that neither he nor the directors of the proposed company had the slightest intention of endeavouring to mislead the public into supposing that the proposed company of "*Louis Tussaud, Limited,*" had any connection with the business and exhibition of "*Madame Tussaud & Sons, Limited,*" and that he had so caused it to be stated in the prospectus, and had also written to the press stating the fact, and he submitted that he was fully entitled to carry on a waxworks exhibition in his own name of *Louis Tussaud* without any interference by the present proprietors of "*Madame Tussaud & Sons, Limited.*"

The prospectus, dated the 12th of March, 1890, stated that the company was formed for the purpose of introducing to the West End of *London* a new exhibition similar in many respects to, but having no connection with, the one so long and successfully carried on in *Baker Street* and the *Marylebone Road*; that the freehold site acquired was one of the most valuable and central in the metropolis, situate in *Shaftesbury Avenue.* There were various statements as to the prospects of the exhibition, and then it was stated that the directors intended, with the aid of Mr. *Louis J. Tussaud*, to equal if not surpass the establishments, which were referred to, viz., two similar exhibitions in *Paris* and *Berlin.* Further, that contracts had been entered into, one dated the 6th of March, 1890, and made between *Harry Smith* of the one part, and *Louis J. Tussaud* of the other part; and another dated the 8th of March, 1890, and made between *Louis J. Tussaud* of the one part, and *W. S. Austin,* for and on behalf of the company, of

the other part; that copies of the memorandum and articles of association, the above-mentioned contracts, the plans, specifications, and schedules, could be inspected at the offices of the solicitors of the company. That was the evidence before the Court when the motion was made; but subsequently the Defendant's solicitors supplied copies of the various documents which were referred to. The memorandum of association, also dated the 12th of March, 1890, included amongst its objects, "To undertake and carry on the business of a waxwork exhibition, and with a view thereto to adopt an agreement expressed to be made between *Louis J. Tussaud* of the one part, and Mr. *W. S. Austin*, on behalf of the company, of the other part, either with or without modifications." The capital of the company was to be £100,000 in 100,000 ordinary shares of £1 each. The memorandum of association was signed by seven persons for one share each, and amongst them was the Defendant, *Louis Joseph Tussaud*. The articles of association provided that the company should after incorporation adopt the agreement of the 8th of March, 1890. Beyond that there was nothing in the articles of association which related to the position of the Defendant with reference to the company. The contract which was entered into on the 6th of March, 1890, was to the effect that Mr. *Harry Smith* agreed to sell to *Louis J. Tussaud* a piece of land in the neighbourhood of *Shaftesbury Avenue*, and that he contracted to erect upon it certain buildings. The price was fixed at £90,000, and there were various stipulations with reference to the buildings, the contents, and the licenses. There was also an agreement with reference to ascertaining a certain portion of the purchase-money for the purpose of paying interest on the paid-up capital. The important agreement was that of the 8th of March, 1890, between the Defendant and *W. S. Austin* on behalf of the company. It recited the agreement of the 6th of March, 1890, and also that the vendor was skilled in the art of modelling in wax; that the vendor should sell to the purchaser as trustee for the company, and should purchase the benefit of the agreement of the 6th of March, 1890; that the company was to perform the agreement, and that the consideration for the sale should be the sum of £7500, which should be satisfied by the payment, on or

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before the 25th of March, 1890, to the vendor of the sum of £5000 in cash, and by the issue to the vendor or his nominees, when the shares in the company were first allotted, of 2500 fully paid-up shares of £1 each in the capital of the company; that the company should be bound to proceed to allotment if at least 60,000 shares were *bonâ fide* applied for on or before the 24th of March, 1890; that the vendor should act as manager of the business of the company for a term of seven years from the opening of the exhibition; that the vendor should, as such manager, perform the duties and exercise the powers which should from time to time be assigned to or vested in him by the directors of the company, and should, unless prevented by ill-health during the term, devote the whole of his time, attention, and abilities to the business of the company, and obey the orders from time to time of the board of directors of the company, and in all respects conform to, and comply with the directions and regulations given and made by them, and should well and faithfully serve the company, and use his utmost endeavours to promote the interests thereof; that the vendor should, during the like period of seven years from the opening of the exhibition, act as and perform the duties of a modeller in wax to the company, and should execute and prepare, and at his own expense supply and set up, all wax figures required by the company from time to time for the purpose of their exhibition; and as and by way of salary and remuneration for the services aforesaid, the company should pay to the vendor a yearly sum of £200, in equal quarterly payments, and a commission of £5 per cent. upon the actual net profits which should be earned by the company; and in addition to the said salary and commission the company should pay to the vendor £30 for every wax figure modelled, finished, and set up by him for the company, that sum to be exclusive of the costs of certain articles necessary for the setting up, such as dresses and ornaments, &c.; and for the consideration aforesaid the vendor covenanted with the company that he would not during the said period of seven years model any wax figures for any person other than the company, or directly or indirectly, and either alone or in partnership with, or as agent, clerk, or servant of any other person or persons, or otherwise howsoever set up or carry on, or

be interested in, the trade or business of a wax-modeller otherwise than for and on account of the company. There was evidence on the one side shewing that there would be, and on the other that there would not be, any likelihood of the public being deceived into thinking that the new company's exhibition was the same as the old one.

Sir *Horace Davey*, Q.C., *Buckley*, Q.C., and *Wace*, for the Plaintiff company:—

The business which the Defendant proposes to commence is exactly similar to the exhibition carried on by the Plaintiff company. Why did the promoters of the proposed new company call it "*Louis Tussaud, Limited*," except for the reason that, the name being so like that of the Plaintiff company, they wish to attract some of the reputation which has been attained by the old firm of "*Madame Tussaud & Sons*"? The Plaintiff company are entitled to succeed on this motion on two grounds: first, on general considerations, which were acted on in the cases of *Massam* v. *Thorley's Cattle Food Company* (1) and *Hendriks* v. *Montagu* (2). The Plaintiff company contend that if the Defendant be allowed to register a company under the name of "*Louis Tussaud, Limited*," the result will be that people from the provinces and from foreign countries visiting *London* will be led to believe that the two waxwork exhibitions are the same, and that consequently the business of the Plaintiff company will be materially damaged. The other ground for relief is that "*Louis Tussaud, Limited*," the proposed new company, should not be registered, as the name is identical with that by which a company is already registered, or so nearly resembling it as, in the words of the 20th section of the *Companies Act*, 1862, "to be calculated to deceive." There is here, as in *Hendriks* v. *Montagu*, a similarity in the names which will lead to mistakes being made by the public. In the case of *Turton* v. *Turton* (3), a firm carried on business under the name of *Thomas Turton & Sons*, and they sought to restrain *John Turton*, who had taken two sons into partnership, and carried on a similar business, from carrying it on under the name of *John Turton & Sons*, and Mr. Justice *North* granted an injunction; but

(1) 14 Ch. D. 748. (2) 17 Ch. D. 638. (3) 42 Ch. D. 128.

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the Court of Appeal dissolved it, because the defendants were carrying on business under their own names. That firm was not an incorporated company, and the case is distinguishable in many respects from the present. It may be observed that in *Hendriks* v. *Montagu* (1) the actuary of a company not registered under the *Companies Act*, 1862, sought to restrain the promoters of a company from registering it under a similar name—that is to say, instead of "society" it was intended to use "association," and though Sir *George Jessel* declined to make the order requested, the Court of Appeal granted it on the ground that the name of the projected new company was so nearly similar as to be calculated to deceive the public. A man may, no doubt, take a fancy name for some reason or another which pleases himself, and carry on business under it. Even supposing that the Defendant is entitled to start a waxworks exhibition, and none the less because his name is *Tussaud*, he is not entitled to obtain the registration of a joint stock company of which he is merely one shareholder under a name and for purposes which are either identical with or so nearly resembling the name and business of the Plaintiff company as to be calculated to deceive the public. The Plaintiff company, and very naturally, object to the Defendant forming a company at all to be carried on under his name; and it is submitted that it matters not whether the company contains amongst its subscribers the real name of *Tussaud* or not. The fact is that the proposed company is not that of *Louis Tussaud*, but of his friends, whom he has got together to promote it, and they have merely selected and claim to use his name because it is similar to that of the Plaintiff company; and they suggest that they should be free to register and carry on business under such selected name. It is not pretended that the proposed company have any right in the name of *Louis Tussaud*, because he has never had any business, and consequently he has had nothing to sell to the company in connection with waxworks: practically, therefore, he proposes to sell his name to a company, which, if it should be allowed, will not be that which they pretend to be. To establish a business in this way is not honest, and the Plaintiff company are, as submitted, entitled to relief.

(1) 17 Ch. D. 638.

[*Hoby* v. *Grosvenor Library Company* (1), and *Merchant Banking Company of London* v. *Merchants' Joint Stock Bank* (2), were also referred to.]

Hastings, Q.C., and *A. à B. Terrell*, and *H. P. Wilkinson*, for the Defendant:—

There is no evidence to shew that the proposed new company's exhibition of waxworks will be passed off as that of the Plaintiff company. They wish to restrain the Defendant from using his name as a new company, limited, because they imagine that the business may be mistaken for theirs in the *Marylebone Road*, and which is wrongly called the old company, for it was registered only last year. The business was always known as "*Madame Tussaud's.*" The words of the 20th section of the *Companies Act*, 1862, are that the proposed new name shall not be identical with that of the subsisting company, or so nearly resembling the same as to be calculated to deceive—in other words, so similar to the proper name of the other company as to be likely to mislead the public; but the Defendant contends that his name is so different to that of the Plaintiff company that there can be no deception. In the case of *Hendriks* v. *Montagu* (3) there was a fancy name, and there might have been fraud, the word used by each company being so similar, and likely to be mistaken. In that case a man was not represented as carrying on a business. In *Turton* v. *Turton* (4) there was the difference of a Christian name only, and careless people might make blunders in confusing "*Thomas*" and "*John*"; but the Court of Appeal refused to allow the injunction to be continued, no doubt considering that the blunders made would be those of the people who might make them. There is nothing dishonest in a man carrying on his business under his own name, even though some blunders may occur. The names in this case are not so similar that they may be mistaken, and if the Plaintiff company were not registered under the Act there could be no reason why the Defendant should not be registered; but even that objection should not be allowed. *Louis Tussaud* has been brought up as a modeller, and he has

(1) 28 W. R. 386.
(2) 9 Ch. D. 560.
(3) 17 Ch. D. 638.
(4) 42 Ch. D. 128.

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been engaged in the business all his life. The name is his own, and it is submitted that it is only reasonable that the proposed company should be allowed to be registered as "*Louis Tussaud, Limited.*" The motion ought to be refused.

[They also referred to *Burgess* v. *Burgess* (1), and *Massam* v. *Thorley's Cattle Food Company* (2).]

Sir *H. Davey*, in reply:—

There can be no dispute that "*Tussaud*" is the prominent name in that of the Plaintiff company and the proposed new company, and if necessary evidence would be admitted for the purpose of shewing that the names of two companies are so similar as to be likely to deceive the public. I deny that because the Defendant's name is *Louis Tussaud* he is entitled to carry on this business under it.

STIRLING, J. (after stating the facts, continued):—

The Defendant, therefore, has not up to the present time carried on any exhibition on his own account; nor is it stated that he has modelled any figures whatever except those which are exhibited in the Plaintiff company's exhibition, and he does not purport to sell to the proposed company any wax figures of his own modelling. It appears from the contracts entered into that his interest in the proposed company is two-fold:—As the recipient by himself or his nominees of 2500 fully paid-up shares, which he might at once dispose of, or deal with in any way he saw fit; and as manager and modeller to the company, being in that respect simply the paid servant of the directors of the company whose orders he would be bound to obey. It cannot be doubted, as it seems to me, that the name of "*Tussaud*" is well known and of high reputation in connection with waxworks, and that if another exhibition of a similar nature to that of the Plaintiff company were to be established in *London* under the Defendant's name, the one would, "in the ordinary course of human affairs, be likely to be confounded with the other"—I am adopting the words of the Lord Justice *James* in the case of *Hendriks* v. *Montagu* (3)—and visitors from the

(1) 3 D. M. & G. 896. (2) 14 Ch. D. 748. (3) 17 Ch. D. 645.

country who have heard of the Plaintiff company's exhibition would be likely to be misled into going to the other. If persons not bearing the name of "*Tussaud*" and deriving no title from anyone bearing that name were to seek to establish under the name of "*Louis Tussaud*" a company such as is promoted by the Defendant, I think that the natural result of their carrying on business under that name would be to mislead people who were desirous of visiting the Plaintiff company's exhibition into going to theirs, and that the persons so doing ought, on the principles laid down in the case of *Hendriks* v. *Montagu* (1), to be restrained by an injunction similar to the order granted in that case. The question which I have to decide is whether the Defendant, bearing, as he does, the name of "*Tussaud*" is equally liable to be so restrained. The principles upon which the Court acts are laid down in the case of *Burgess* v. *Burgess* (2). I refer more particularly to the judgment of Lord Justice *Turner*, who said (3): "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the Defendant is selling his own goods as the goods of another." That is the general proposition, and then he proceeds to specify two cases: "Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is a false representation or not." That statement of the law was cited and approved of in the recent case before the Court of Appeal of *Turton* v. *Turton* (4). It follows from the decisions in those two cases that the Defendant is at perfect liberty to open on his own account and to carry on in his own name an exhibition of waxworks. Further, he might take partners into his business, and carry it on under the name of "*Louis Tussaud & Co.*" That seems to me to have been

(1) 17 Ch. D. 638.
(2) 3 D. M. & G. 896.
(3) 3 D. M. & G. 904.
(4) 42 Ch. D. 128.

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expressly decided in *Turton* v. *Turton* (1). Having commenced business on his own account, I apprehend that he might sell it with the benefit of the goodwill to third parties, and that the third parties might, if they thought fit, continue to carry on the business under the same name—that of the Defendant: that is to say, they would be entitled to the full benefit of the goodwill which they had honestly and legitimately purchased from the Defendant. Again, the third parties might transfer the business and the goodwill to a joint stock company, and without expressing a final opinion on the point I am not prepared at the present moment to say that that company might not be registered under the same name as had previously been used in connection with the business.

On the other hand, I conceive it to be clear that the Defendant could not, either for valuable consideration or otherwise, confer on another person the right to use the name of "*Tussaud*" in connection with a business which the Defendant had never carried on, and in which the Defendant had no interest whatever. Then comes the question, Can he confer that right on a person or a company towards whom he stands simply in the position of a paid servant? He could no doubt confer the right of saying that the business is under his management, but could he go to some private individual and say to him, "I will become your servant as manager and modeller for seven years, and you shall carry on the business (which is not to be mine, but yours) under my name"? I think not. Would it make any difference that, instead of going to a private individual, he invited the public to become proprietors of a business upon the like terms? On that question there is, I do not say decision, but some authority. In the case of *Massam* v. *Thorley's Cattle Food Company* (2), a person named *Joseph Thorley* manufactured food for cattle according to a recipe which he had obtained, and sold it under the name of "*Thorley's Food for Cattle.*" Upon his death the plaintiff succeeded to his business and continued it, and shortly afterwards the defendant company was registered as a limited company, with a capital of £200 divided into 4000 shares of 1s. each. The articles of association provided that the directors might

(1) 42 Ch. D. 128. (2) 14 Ch. D. 748.

enter into an agreement with *J. W. Thorley*, a brother of the plaintiffs' predecessor in title, who had become acquainted with the secret of the manufacture, for the purchase of the secret and for his employment in the business of the company. The decision in the case was not given on that simple state of facts; but Lord Justice *James* (1) said: "We have had nothing like a satisfactory explanation of how *J. W. Thorley's* company came into existence, unless it was that the promoters thought that *Thorley's* food was a very profitable thing and had got a great reputation, and that they should like to steal the reputation which it had acquired. In order to do that they somehow or other got into communication with a brother of the late *Joseph Thorley*, who for some years had been in the service of *Joseph Thorley*, and during those years, according to his own account, which I take to be true, had acquired a knowledge of the recipe and of the manufacture, but who, for several years previous to the existence of this company, had never had anything to do with the manufacture of food for cattle. Having the name of *Thorley*, which was the distinguishing mark of the food for cattle, he either tendered himself for sale or was found for purchase by some persons in order that his name might be got into a joint stock company formed for the sake of selling these goods. Why was that name got in there except for the purpose of inducing the world to believe that it was the same concern, or that it was the *Thorley*, that it was the same *Thorley*, or a continuation of the same *Thorley*, whose name was the principal characteristic of the name of the article?" What follows is very material. "The name of the company is to my mind a fiction. The meaning which the name of '*J. W. Thorley & Co., Limited*,' would convey to any person's mind is that there had been a partnership of *J. W. Thorley & Co.*, a real partnership which had been carrying on business in the manufacture of this food for cattle, and that for some reason or other, such as we have seen constantly in our experience in this Court, the partnership had been minded to convert itself into a limited company for the more convenient transaction of its business. But here *J. W. Thorley* was not a partner. *J. W. Thorley* was employed as an agent, as the manager, and *J. W. Thorley's* only connection with

(1) 14 Ch. D. 756-7.

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the company, *quâ* company, is that he had a 1*s.* share in this company." In this case the Defendant has a much larger interest than that. "To my mind that is the same thing as if somebody were to get up a brewery at *Burton*, finding somebody of the name of *Bass*, or somebody who would take the name of *Bass* (for there is no law to prevent a man assuming any name he likes), and then get a company registered under the name of '*J. Bass & Co., Limited*,' or '*W. Bass & Co., Limited*,' and advertise '*Bass & Co.'s* Pale Ale.' I really can see no distinction between '*Bass & Co.'s* Pale Ale,' as advertised by such a company, and '*Thorley's Food for Cattle*,' advertised by the company now before us, which has procured a person of the name of *Thorley* to be connected with their company. That of itself to my mind is a very strong thing to begin with, and then next we have to look at the advertisements, the circulars, and the almanack." I do not rely upon that case as a decision actually covering the point in this case, but simply refer to the observations of the Lord Justice as indicating the view which he took of such a state of circumstances. With that case may be contrasted the case of *Turton* v. *Turton* (1) which was very much relied upon for the defendant. There the plaintiffs, under the name of *Thomas Turton & Sons*, had for many years carried on the business of steel manufacturers. The defendant, *John Turton*, had for many years carried on a similar business in the same town, at first as *John Turton*, then as *John Turton & Co.*, and afterwards he took his two sons into partnership, and carried on the same business as *John Turton & Sons*, and the Court of Appeal held that the plaintiffs were not entitled to an injunction to restrain the defendants from the use of the name *John Turton & Sons*. What was the ground of the decision? Lord Justice *Cotton*, after referring to the case of *Burgess* v. *Burgess* (2) and stating that the principle upon which it was decided was that "No man must pass off his goods as the goods of another . . ." observed (3): "As I said before, it is simply a question of name. Here in my opinion, what has been done by the defendants is simply in the ordinary mercantile way to indicate to the world and to the customers of the firm that the sons

(1) 42 Ch. D. 128. (2) 3 D. M. & G. 896.
(3) 42 Ch. D. 142.

have been taken into the business and are carrying on the business with their father . . . Here if I am right in the conclusion at which I have arrived as to matters of fact, that without any fraudulent intention, and merely in the ordinary mercantile way of indicating the fact that the sons are partners, the defendants have taken the name, it would be wrong to hold that this was a fancy name, or anything but a short convenient way of indicating that the sons are in the business, and have been taken in as partners." . . . . His Lordship afterwards referred to *Croft* v. *Day* (1), and said (2): "The defendant was a man of the name of *Day*. . . . . He was restrained not from carrying on business in the name of *Day & Martin*, but from representing that his goods were goods manufactured by the old firm of *Day & Martin* . . . . He had got somebody of the name of *Martin* who was no connection in business with him to agree to come in and be his partner so as to get the benefit of the name of *Day & Martin*. Getting a man who is not interested in the business to come in and join him for the purpose of saying he has the name of *Day & Martin* would be very strong evidence indeed to shew that he was trying to represent his goods as those of the old firm. . . . . In *Hendriks* v. *Montagu* (3) there was a question between two companies. One was called the *Universal Life Assurance Society*—that was the plaintiff company—and the defendants chose to call themselves the *Universal Life Assurance Association*. That name of the defendants was in no way a statement of facts, or of the persons who were going to carry on the business. . . . It could not but be according to the ordinary course in the understanding of the people who had to deal with them, a representation that the business carried on by the defendants was the business in fact carried on by the plaintiffs. Therefore the Court stopped that and prevented it from being done. In that case also this fact was not immaterial, that although it was not a case under the *Companies Act* they were governed by the provision there that no name should be registered like a name already registered. In my opinion that case cannot be in any way relied upon in the present case. . . ." And at the close of his

(1) 7 Beav. 84. (2) 42 Ch. D. 144, 145.
(3) 17 Ch. D. 638.

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judgment the Lord Justice said (1): "In my opinion it would be wrong to come to the conclusion here that there was any passing off of the goods of the defendants as the goods of the plaintiffs. It must be a question of fact, as indicated by Lord Justice *Turner* in the case of *Burgess* v. *Burgess* (2). The mere fact that the name used by the defendants is the same as that of another person, in my opinion will not justify the Court in assuming that the defendants are passing off their goods as the goods of that other person. It may lead to the conclusion that there will be some difficulty occasioned by the fact, as undoubtedly there will be, but in my opinion when a man fairly states the business which is carried on in his own name or in the names of his partners it is not that his goods may be passed off as the goods of some other person; it is only a representation that they are made by himself." The judgments of the Master of the Rolls and Lord Justice *Fry* are to the like effect. So that the basis of the decision in that case was that the defendants could not be restrained from making a perfectly true representation as to the business which they carried on. There no false representation was made: but here in like manner, as in the case of *Massam* v. *Thorley's Cattle Food Company* (3), the name of the company represents that which is not true in fact. The company is proposed to be called "*Louis Tussaud, Limited*," and the natural effect of that would be to convey to the public the idea that there had been a business carried on under the name of "*Louis Tussaud*," and that for some reason or another that business so carried on had been handed over to a public company. But in point of fact there never has been any business carried on by *Louis Tussaud* either under his own name, or under any other, nor has there been any business of which he has been the proprietor, and I think that the presumption which ought to be made is similar to that in the first of the two cases dealt with by Lord Justice *Turner* in the passage which I have read, namely that *primâ facie*, the object of the Defendant in promoting the proposed company is to induce the world to believe that the business intended to be carried on is that of the Plaintiff company or a branch of it.

(1) 42 Ch. D. 146. (2) 3 D. M. & G. 896.
(3) 14 Ch. D. 748.

It was said, however, that the prospectus plainly stated on the face of it that the new exhibition has no connection with the Plaintiff company. That is true, and the statement would be a complete answer to any person who complained that he had been misled into taking shares in the new company on the faith that it was connected with the Plaintiff company; but is it an answer to the Plaintiff company's complaint, which is that the natural result of the intended acts of the new company will be to induce the public at large to suppose that its business is that of the Plaintiff company? Upon that Lord Justice *Cotton* said, in *Turton* v. *Turton* (1): "I do not in any way say that fraud is necessary to induce the Court to interfere except this, as I said before. When a man knows that the natural consequence of what he is doing is to represent his goods as the goods of somebody else, then it is wrong on his part to continue that act." In my opinion those observations apply here. If the Defendant when communicating with the private individual to whom I have already referred had written saying, "The business which you propose to carry on will have no connection with that in the *Marylebone Road*," and he had replied, "Of course not," none the less would the Defendant be liable to be restrained. I think, therefore, that an injunction ought to be granted in similar terms to the order which was made in *Hendriks* v. *Montagu* (2), that is to say, an injunction to restrain the Defendant until trial or further order from registering under the *Companies Acts* any company to be incorporated under the name of "*Louis Tussaud, Limited*," or any other name likely to mislead or deceive the public into the belief that the new company is the same as the Plaintiff company.

Solicitors: *E. F. & H. Landon; Terrell, Atkinson, & Winstanley.*

(1) 42 Ch. D. 144. (2) 17 Ch. D. 638.

T F M

STIRLING, J.

1890

April 17, 23.

PHILLIPS *v.* HOMFRAY.

[1866 P. 157.]

Minerals wrongfully taken—Compensation, Interest on—3 & 4 Will. 4, c. 42, s. 29 [Revised Ed. Statutes, vol. vii., p. 415]—Action for Money had and received—Claim for Interest made on Further Consideration.

By the decree made in this suit in 1871 it was declared that the Defendants *S. H.* and *R. F.* and the estate of the deceased Defendant *W. H. F.*, were answerable for all minerals gotten or removed from under the Plaintiffs' farm; and an inquiry was directed what quantities of minerals had been so gotten or removed, and it was ordered that the value at the pit's mouth of all minerals so gotten or removed with just allowances for carriage, but none for getting, should be certified.

After the decree the Defendants *S. H.* and *R. F.* died, and the suit was continued, so far as the inquiry was concerned, against their representatives.

The official referee having, in December, 1889, reported the value at the pit's mouth of the minerals taken to be £9028 6*s.* 0*d.*, the Plaintiffs, upon the further consideration of the suit, claimed to be entitled to interest on that amount with half-yearly rests, upon the grounds, first, that damages may be given in the nature of interest under 3 & 4 Will. 4, c. 42, s. 29 in all actions of trover or trespass *de bonis asportatis*, and that the suit was in effect an equitable action of trover, and secondly, that the Defendants, as accounting parties who had had the use of the Plaintiffs' money, were in the position of trustees thereof for them:—

Held (1) that the suit must be treated, not as an action of trover or trespass, but as an action for money had and received, to which the 29th section of 3 & 4 Will. 4, c. 42 did not apply; (2.) that no fiduciary relation existed between the parties; and (3.) that the claim, if made at all, ought to have been made and adjudicated upon at the hearing, and was too late when made upon further consideration; and held, consequently, that the Plaintiffs were not entitled to any interest upon the sum mentioned in the report.

Dreyfus v. *Peruvian Guano Company* (1) distinguished.

FURTHER CONSIDERATION.

This suit was instituted in 1866 against *Samuel Homfray*, *Rowland Fothergill* and *William Henry Forman*, who traded under the style of the *Tredegar Iron Company*, for the purpose of obtaining a declaration that the Defendants were liable to the Plaintiffs in respect of certain coal and ironstone gotten and removed by them from under the Plaintiffs' farm, and for conse-

(1) 42 Ch. D. 66; 43 Ch. D. 316.

quential relief. In August, 1869, *W. H. Forman* died, and the suit was revived against his executors.

By the decree of *Stuart*, V.C., as varied by the Court of Appeal in June, 1871 (see *Phillips* v. *Homfray* (1)), it was, amongst other things, declared that the Defendants *Fothergill* and *Homfray* and the estate of the deceased Defendant *Forman* were answerable to the Plaintiffs for and in respect of all coal and ironstone gotten or removed by them from under the Plaintiffs' farm, and that the Defendants *Homfray* and *Fothergill* were liable to make compensation to the Plaintiffs for user of all roads and passages under the said farm, and an inquiry (No. 1) was directed what quantities of coal and ironstone had been so gotten or removed; and it was ordered that the market price or value of all coal and ironstone so gotten or removed, at the pit's mouth (all just allowances being made to the Defendants in respect of their charges and expenses on account of the carriage to the pit's mouth of such coal and ironstone, but no allowance being made for the expense of getting, severing or working the same) should be certified. Three other inquiries (Nos. 2, 3, and 4) were also directed as to the quantities of minerals which had been conveyed from the Defendants' collieries over or through the roads or passages under the Plaintiffs' farm; as to the amount which ought to be paid to the Plaintiffs in respect of the user by the Defendants of such roads or passages for the working of their collieries; and whether the farm and mineral property of the Plaintiffs had sustained any and what damage by reason of the manner in which the Defendants had worked the minerals under the Plaintiffs' farm.

While these inquiries were pending the Defendant *Fothergill* died, in September, 1881. The suit was revived against his executrix, and upon her motion inquiries 2, 3, and 4 were, in July, 1883, stayed by the Court as against her, upon the ground that a remedy for a wrongful act done by a deceased person cannot be pursued against his estate, unless property or the proceeds or value of property belonging to another person have been appropriated by the deceased person and added to his estate: see *Phillips* v. *Homfray* (2).

(1) Law Rep. 6 Ch. 770.

(2) 24 Ch. D. 439.

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Samuel Homfray, the last surviving Defendant, died on the 10th of November, 1882. The suit was revived against his executors, and in June, 1884, all further proceedings under inquiries 2, 3, and 4, were stayed as against them. On the 2nd of December, 1889, the official referee before whom inquiry No. 1 had been prosecuted reported that the market price or value at the pit's mouth of the coal and ironstone gotten or removed by the original Defendants, after making the allowances mentioned in the decree, was £9028 6*s*. The suit now came on upon further consideration, and the only question calling for a report was whether the Plaintiffs were entitled to any and what interest upon the sum so found by the referee.

Hastings, Q.C., and *F. T. Procter*, for the Plaintiffs:—

We are entitled (1) to interest at 5 per cent. upon £9028 6*s*., the value of the minerals taken, from the time when they were removed.

The Court will not allow a man to make a profit out of his own wrong; and the Defendants wrongfully took our coals and sold them at a profit, and have all this time had in their pockets, and probably used in their business, moneys which ought to have been handed over at once to us. It cannot be said that we have lain by, for in 1884 we applied to *Kay*, J., for an order for the payment of those moneys into Court. Under the Act 3 & 4 Will. 4, c. 42, s. 29, the Court has power to give damages in the nature of interest in actions of trover or trespass *de bonis asportatis*; and this is, in fact, an equitable action of trover: *Wood* v. *Morewood* (1); *Mayne* on Damages (2); *Dreyfus* v. *Peruvian Guano Company* (3); *Martin* v. *Porter* (4).

We also claim (2) interest with half-yearly rests. We have been kept out of our money for twenty-five years; and, having lost compound interest, are entitled to be put in the same position as if no wrong had been done to us. By the decree the Defendants are accounting parties, and they are accountable for any profit they may have made, and are chargeable either with that profit

(1) 3 Q. B. 440, n.
(2) 4th Ed. p. 372.
(3) 42 Ch. D. 66; 43 Ch. D. 316.
(4) 5 M. & W. 351.

or with compound interest at 5 per cent.: *Burdick* v. *Garrick* (1); *Jones* v. *Foxall* (2); *Williams* v. *Powell* (3); *Attorney-General* v. *Alford* (4). These last cases are cases of trustee and *cestui que trust*; but, having taken our coal, and used in their business money belonging to us which they have had in their hands, the Defendants have put themselves in this position of trustee for us.

In *Livingstone* v. *Rawyards Coal Company* (5) it was held that the value of the coal which had been taken must be the value of it to the person from whom it was taken, at the time it was taken. There the coal was taken under an innocent mistake; and Lord *Blackburn* said: (6) "If they had taken it with full knowledge *scienter*, there would have been very much more damage given."

[STIRLING, J.:—Ought this not to have been made a part of the decree at the hearing?]

The further consideration is, we submit, the proper time to ask for interest; for, until the value of what had been wrongfully taken from us had been ascertained, the question did not properly arise. As this value has gone into the pockets of the deceased wrongdoer, and the last receipt was in 1866, the maxim, "*actio personalis moritur cum personâ*," does not apply.

Rigby, Q.C., and *Sangster Green*, for the legal personal representatives of the Defendants *Forman* and *Homfray*:—

The sum which the Referee has found is in reality a penal sum, for it is the value of the coal at the pit's mouth, without any allowance for the expense of getting, severing, or working it. The claim on which inquiry No. 1 was founded was a claim on a wrongful act, and the value without these allowances was given by the decree partly as the penalty for the wrongful act, and partly as compensation. The Plaintiffs now ask in addition for a measure of damages which has never before been given; and they are in this difficulty, that they found their claim for interest upon sect. 29 of the statute 3 & 4 Will. 4, c. 42, which only applies to actions of trover and trespass; while, if they

(1) Law Rep. 5 Ch. 233, 241.
(2) 15 Beav. 388, 394.
(3) Ibid. 461.
(4) 4 D. M. & G. 843.
(5) 5 App. Cas. 25.
(6) Ibid. 42.

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claim interest on that ground, then, as those are personal actions, the maxim "*actio personalis moritur cum personâ*" applies, and the Plaintiffs' right of action is gone altogether. Moreover, upon the language of sect. 28, the jury can only allow interest upon "debts or sums certain payable at a certain time or otherwise." This sum was only ascertained by the referee's report, and is not even now payable. This is in reality a money claim, and can only be made as such. The only form of action open to the Plaintiffs is an action for money had and received.

Compound interest has no doubt been allowed as between trustee and *cestui que trust*, where the trustee, whose duty it was to invest the money so as to produce an income for his *cestui que trust*, has committed a breach of trust by employing the money in trade or speculation for his own benefit. But there was no fiduciary relationship between the parties in this case, and the principle does not apply; and the Plaintiffs have got a profit, for they get the value of the coal without the expense of getting it. We do not contest the liability to pay the £9028 6*s.*, but we have not and never had any duty or liability to invest it.

The twenty or twenty-five years' delay has been occasioned by the view which the Plaintiffs took of their own interests, and for twelve years they could not satisfy themselves whether their proceedings would enure for their own benefit or that of Lady *Llanover*.

This claim for interest, if made at all, should have been made at the hearing, and, if allowed, should have formed part of the decree, for no new demand of this kind can be made on further consideration.

Buckley, Q.C., and *Osler*, for the legal personal representatives of the Defendant *Fothergill*.

Hastings, in reply, referred to *Hambly* v. *Trott* (1).

1890. April 23. STIRLING, J.:—

The first ground on which it is sought to charge interest is that the Plaintiffs are entitled to it under the statute 3 & 4

(1) 1 Cowp. 371, 377.

Will. 4, c. 42, s. 29. That section is confined to actions of trover and trespass *de bonis asportatis*. The question is, whether I can treat this present action as an action, as it was put in argument, in the nature of an equitable action of trover. It was decided in the case of *Hambly* v. *Trott* (1), that an action of trover was one to which the rule of law, "*actio personalis moritur cum personâ*," applies. There the action was brought against an executor for a conversion by his testator, and upon a plea of not guilty by the testator there was a verdict for the plaintiff. The case was twice argued, and, after judgment had been reserved, Lord *Mansfield*, in delivering the judgment of the Court, concludes as follows: "The form of the plea is decisive, viz., that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise *ex delicto*, or *ex maleficio* of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an action for money had and received." Thereupon judgment was arrested.

That case was much considered and discussed in this very case of *Phillips* v. *Homfray*, upon the appeal (2), and after reading carefully the judgment of Mr. Justice *Pearson*, and the judgments delivered in the Court of Appeal, it does not appear to me that the proposition of law on which *Hambly* v. *Trott* was decided was in any way disputed. It was accepted by all the Judges as good law that an action of trover is one which dies with the person. The question on which the majority of the Court of Appeal differed from Lord Justice *Baggallay* and Mr. Justice *Pearson* seems to have been whether any form of action could be suggested which could be brought at law in which the damages or the sums which were sought to be recovered by means of the inquiries 2, 3, and 4, could be recovered against an executor, and the opinion of the majority of the Court of Appeal was that no such action could be suggested. The judgment of Lord Justice *Bowen* seems to me to shew that very clearly. I will read one or two passages from it which appear to me to contain the substance of all that I need mention. He says (3): "The only cases in which,

(1) 1 Cowp. 371, 377. (2) 24 Ch. D. 439. (3) 24 Ch. D. 454, 460.

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apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. . . . The true test to be applied in the present case is whether the plaintiffs' claim against the deceased *R. Fothergill* in respect of which inquiries 2 and 3 were directed in his lifetime, belongs to the category of actions *ex delicto*, or whether any form of action against the executors of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty. In other words, could the plaintiffs have sued the deceased at law in any form of action in which 'not guilty' would not be the proper plea. If such alternative form of action could be conceived, it must be either an action for the use, by the plaintiffs' permission, of the plaintiffs' roads and passages, similar in principle, though not identical, with an action for the use and occupation of the plaintiffs' land. Or it must be in the shape of an action for money had and received, based upon the supposition that funds are in the hands of the executors which properly belong in law or in equity to the plaintiffs. We do not believe that the principle of waiving a tort and suing in contract can be carried further than this—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief." That is the ground of the decision of the majority of the Court of Appeal, which I need not say is binding upon me. The decision was that the proceedings must be stayed under inquiries 2, 3, and 4, but not under inquiry 1, with which I am now dealing. Having regard to that, I am of opinion that this action cannot be treated as in the nature of an action of trover, but rather as in the nature of an action for money had and received.

It appears to me, therefore, that sect. 29 of the Act of 3 & 4

Will. 4, c. 42, does not apply, and that, if any section of that Act does apply, it is sect. 28. That section was not relied upon in the opening of the case by counsel for the Plaintiffs, and in his reply he stated expressly that he could not bring himself within that section. It appears to me, therefore, that the application for interest, so far as it is based upon the statute, fails.

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Then it was further said, that the Defendants were accounting parties, and that there was a general principle that accounting parties may be charged with interest. The principal cases which were cited in support of that proposition were two very well known cases: *Burdick* v. *Garrick* (1), and *Attorney-General* v. *Alford* (2). In both these cases a fiduciary relation subsisted between the plaintiffs and the defendants, and the right to interest on the part of the plaintiffs was treated as arising by virtue of that relation, and the duty which the defendants owed to the plaintiffs by reason of it. No such relation exists here, and therefore the cases cited do not, in my opinion, apply. It was on those grounds that the Plaintiffs rested their case. They appear to me to fail—and, perhaps, it might be sufficient to stop there—but I think it right to add this, that it does appear to me that the decree, as it now stands, is not consistent with the claim which is put forward by the Plaintiffs. The decree appears to be framed so as simply to give the Plaintiffs compensation for the value of this property to be ascertained by means of the inquiry No. 1. If the Defendants were to be charged with interest, it seems to me that the right course would have been to have made that case at the trial, and to have had inserted in the decree proper directions as to the mode in which the interest was to be charged and ascertained. No such directions are to be found in it; and I think that it is too late now for the Plaintiffs to come forward and ask to charge the Defendants with interest. The decree was not made till 1871. At the trial it must have been known that all the improper workings which were complained of had taken place prior to this, and the Plaintiffs obtained a decree in which they charged the then Defendants with the value upon the footing on which the compensation is ascertained when defendants have been guilty, not of a

(1) Law Rep. 5 Ch. 233. (2) 4 D. M. & G. 843.

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mere accidental trespass, but of a wilful tortious act. That gives the Plaintiffs more than the simple value of the property, because it gives them the value of the property without any allowance for the expense of getting, or severing, or working the minerals. For these reasons, I think the claim for interest cannot be sustained. I only desire to add this, that I do not think that in the present decision I depart from anything that was laid down or decided in the case of *Dreyfus* v. *Peruvian Guano Company* (1), to which I was referred. In that case, the form of the judgment was different. There the inquiry directed was what damages had been sustained by the plaintiffs by reason of the detention by the defendant company of the cargoes of guano in question in the action; and in working out that inquiry as to damages, the Chief Clerk allowed interest. It was held by Mr. Justice *Kay*, and, as I understand, also by the Court of Appeal, that he was justified in so doing by reason of the statute. But, in the first place, that was a different form of inquiry, and, in the second place, there was no room for the application of the maxim, "*actio personalis moritur cum personâ*," the defendant there being a company, and being in existence as such at the date of the further consideration as well as at the time when the wrongful acts complained of were committed. I think, therefore, that no interest can be allowed.

Solicitors: *Ullithorne, Currey, & Villiers*, agents for *Simons & Plews, Merthyr Tydfil; T. W. Denby; Field, Roscoe & Co.*

(1) 42 Ch. D. 66; 43 Ch. D. 316.

W. W. K.

In re BRISTOL JOINT STOCK BANK.

KEKEWICH, J.

1890 April 19, 26

Company—Winding-up—Shareholder's Petition—Impossibility of carrying on Business — Substratum gone — Reserve Capital—Companies Act, 1879 (42 *& 43 Vict. c.* 76), *s.* 5—*Companies Act,* 1862 (25 *& 26 Vict. c.* 89), *s.* 79, *sub-s.* 5 [*Revised Ed. Statutes, vol. xiv., p.* 220.]

Where by the constitution of a limited company a portion of its uncalled capital is not capable of being called up, except in the event of and for the purpose of the company being wound up, the contract of a shareholder with his fellow-shareholders as regards such reserve capital is that the business of the company shall be carried on with a certain amount of capital, of which he is to contribute a fixed proportion, and on the faith of the credit attaching to his liability to contribute a further proportion in the event of a winding-up; but it is not a part of his contract that the business shall be carried on, notwithstanding that the original capital has been exhausted, so as in that way to bring into active operation the contingent liability to contribute in the event of a winding-up.

Consideration of the principles by which the Court is guided in deciding whether or not a company ought to be wound up on the petition of a shareholder.

A banking company had a capital of £24,000 in 2400 shares of £10 each, of which £5 was paid and the other £5 was not to be called up except in the event of and for the purposes of the company being wound up. The company had been in existence for six years, but had never made any profit, and its business, which had commenced with a considerable staff in extensive premises, was now being carried on in small premises, attended by a single clerk. From the last balance-sheet of the company it appeared that all the paid-up capital except £337 had been exhausted. Three months after the date to wh'ch the balance-sheet was made up a shareholder presented a petition for the winding-up of the company. The petition was supported by a considerable number, but not a majority, of shareholders. No creditor appeared:—

Held, that it was impossible that the business of the company could be carried on with any reasonable hope of success, and that under the circumstances a winding-up order ought to be made.

PETITION presented on the 8th of March, 1890, by a shareholder for the winding-up of the *Bristol Joint Stock Bank, Limited.*

The bank was incorporated on the 21st of May, 1884, under the *Companies Acts*, 1862 to 1883, as a company limited by shares, and was formed to establish and carry on the business of bankers, with head offices in *Bristol*, and with branch offices at such places as might be determined on in *Great Britain* or elsewhere.

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The company was originally registered without articles of association; but, by special resolutions passed in June, 1884, articles of association were adopted in substitution for Table A to the *Companies Act*, 1862, and the share capital was increased to £1,000,000, divided into £10 shares. By the memorandum of association it was provided that not more than £5 per share, being one-half of the company's subscribed capital for the time being, should be called up except in accordance with the provisions of the *Companies Act*, 1879.

The articles of association contained the following provisions:—

"Art. 8. The capital of the company may be issued at several times. The first issue of capital shall be £200,000."

"Art. 78. The remuneration of each director shall be £200 per annum, and an extra £50 per annum for the chairman, in addition to all travelling and other expenses incurred on account of the company, and such remuneration and expenses shall be appropriated by the board out of the funds of the company."

"Art. 105. All costs, charges, and expenses incurred or sustained in or about the establishment and formation of the company, . . . which the board consider may be fairly deemed and treated as preliminary, shall be placed to a separate account, to be called the 'Preliminary Expenses Account,' and shall be chargeable on the funds of the company, and may be spread over such period, not being more than ten years, as the board may deem expedient."

"Art. 119. The directors may, before recommending any dividend or bonus, set aside out of the profits of the company such a sum as they think proper as a reserved or other fund, and may invest the same."

"Art. 124. If at any time the directors find that the losses of the company have exhausted the reserved fund, and also three-fourths of the paid-up capital, they shall forthwith call an extraordinary meeting, and submit to it a full statement of the affairs of the company.

"Art. 125. If it appears to the extraordinary meeting, and be duly resolved, that the ascertained losses of the company from bad debts have exhausted the reserve fund, and also three-fourths

of the paid-up capital, the meeting may declare the company dissolved, except for the purpose of winding-up its affairs.

"Art. 126. The company may at any time, on a resolution passed by at least three-fourths, both in number and in value, of the shareholders present in person or by proxy, at an extraordinary meeting, and confirmed by a majority, both in number and in value, of the shareholders present in person or by proxy, at a second extraordinary meeting, held more than twenty-one days, but not more than forty-two days, after the first extraordinary meeting, be dissolved; and whether the object of the dissolution be the absolute winding-up and dissolution of the company, or the modification or reconstruction of the company, or any other object."

Only 2400 shares were allotted, and on these £5 per share, amounting in all to £12,000, had been paid up.

In the year 1885 petitions were presented by shareholders for the winding-up of the company. Vice-Chancellor *Bacon*, however, dismissed these petitions, being of opinion that it was not sufficiently proved that the company was insolvent.

By the last balance-sheet of the company, issued in December, 1889, and made up to the 7th of that month, it appeared that of the £12,000 paid up, £7855 16*s.* 2*d.* had been lost. In addition to this a sum of £3807 2*s.* 1*d.* had been expended on, or was due in respect of, preliminary expenses. The balance of assets over liabilities was thus shewn to be £337 1*s.* 9*d.*

It appeared, however, that there was a sum of upwards of £1100, arrears unpaid in respect of remuneration and travelling expenses of the directors. Payment of these arrears had not been demanded by the directors, but their right to payment had not been in any way released or waived.

The business of the bank was commenced with a considerable staff in extensive offices, but was now carried on in an office which was not in a principal street, and which was attended by a single clerk. Shares in the company had been sold at a nominal price, and had been returned to the Inland Revenue as worthless.

It did not appear that the company had ever made any profits so as to be able to declare a dividend. Negotiations had recently

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been entered into with a view to the transfer of such business as the company had to another bank.

The Petitioner, who was the holder of fifty shares in the company, by his petition alleged that under the circumstances it was impossible to raise further capital or to create credit in the bank, that it was an absolute failure, that its substratum was gone, and that it was impossible to resuscitate it.

By the *Companies Act*, 1879, s. 5, a limited company may by a special resolution declare that any portion of its capital which has not been already called up shall not be capable of being called up except in the event of, and for the purpose of, the company being wound up; and thereupon such portion of capital shall not be capable of being called up, except in the event of, and for the purposes of, the company being wound up.

Rigby, Q.C., and *Farwell*, for the Petitioner:—

The company is entirely insolvent and unable to pay its debts within the meaning of the *Companies Act*, 1862, s. 79. The case is a peculiar one by reason of the existence of the reserve capital, which is not to be called up except in the event and for the purposes of the company being wound up. The existence, therefore, of the reserve capital is not, it is submitted, material in considering the question of the present insolvency of the company. According to the directors' own statement, contained in the last balance-sheet, out of the £12,000 paid-up capital only £337 1*s.* 9*d.* remains. But this does not include a sum of over £1100, due to the directors for their remuneration, and in respect of which they are entitled to rank as creditors: *In re Dale and Plant* (1). The claim for this remuneration was not withdrawn at the time when the petition was presented, and as matter of law the state of things existing at that time ought to be regarded; and the directors cannot by now withdrawing their claim re-establish the solvency of the company. When the previous petitions for winding-up were before *Bacon*, V.C., in 1885 they were, no doubt, rightly held to be premature because insolvency could not be proved. The body of shareholders who desired a winding-up have therefore been obliged to wait and see their capital dwindling

(1) 43 Ch. D. 255.

away; but now that they have proved the insolvency they are entitled to have the company wound up.

Further, it is clear, having regard to all the circumstances of the case, including the history of the company and the nature of its business, that the substratum of the company is gone within the principle of *In re Haven Gold Mining Company* (1). The company has been in existence for six years, during which time the directors have never been able to declare a dividend; and the result of the company's operations has simply been to sweep away the capital it had to trade with. There is in truth no banking business, and nothing wherewith a banking business can be carried on. There is nothing left which corresponds to the enterprise to which the shareholders subscribed.

Renshaw, Q.C., and *Farwell*, for forty shareholders holding 1019 shares, supported the petition.

Marten, Q.C., and *E. Ford*, for the company:—

It has not been shewn that the company is insolvent or unable to pay its debts within the meaning of sects. 79 and 80 of the *Companies Act*, 1862. There is no creditor suing for payment, nor has any judgment been recovered against the company. As *Bacon*, V.C., said when giving judgment in 1885, a banking business does not necessarily require capital; a large banking business may be done by means of the capital deposited by customers. For a series of years there has been a section of the shareholders of this company lying in wait for an opportunity to have it wound up; and this accounts for the difficulties which the directors have had in carrying on the business. The balance-sheet shews a surplus of assets over liabilities, as the directors are willing to waive their claim to remuneration unless the company is ordered to be wound up. The surplus of assets over liabilities is in reality more than the £337 1*s.* 9*d.* shewn by the balance-sheet. By article 105 the preliminary expenses are to be placed to a separate account, and payment is to be spread over a period of ten years. As the company has been in existence rather less than six years, it is not fair, in considering its present position,

(1) 20 Ch. D. 151.

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to deduct the whole of the preliminary expenses from the capital; only six-tenths should be set down against capital. If this is done, there will be left a large balance of assets. By the *Companies Act*, 1862, s. 80, inability to pay debts is very clearly defined. There can be no such inability unless there are debts absolutely due, not merely capable of being demanded, but which have been demanded or are immediately payable: *In re European Life Assurance Society* (1); *Ex parte Spackman* (2). As to the reserve capital, it has never been decided whether, upon the question of the company's inability to pay debts, the existence of such capital ought or ought not to be taken into consideration. It is submitted it ought, because the company in the event of a winding-up will be able with the aid of the £12,000 reserve capital to pay every debt, and there is no reason why the company should not continue to carry on its business on the credit of the reserve capital.

The argument that the substratum of the company is gone cannot be sustained. There has been no failure of the purpose for which the company was formed, viz., that of carrying on a banking business. It has such a business, and there is a possibility of its increasing and becoming profitable; if the Petitioner and those who act with him would assist the directors instead of obstructing them, the bank would be prosperous. None of the reported decisions on the question of the substratum of a company being gone are applicable to the present case. In *In re Haven Gold Mining Company* (3) the company could not acquire the mine which it was established to work, and therefore the Court held that the substratum was gone. So in *In re German Date Coffee Company* (4), the German patent which the company was formed to work never had any existence. In *Baring* v. *Dix* (5) the patented invention which the partnership was formed to work totally failed and was entirely given up. The mere fact that the business has been carried on at a loss is not sufficient to entitle a shareholder to a winding-up order: *In re Suburban Hotel Company* (6). By article 126 of the articles of association special

(1) Law Rep. 9 Eq. 122, 127.
(2) 1 Mac. & G. 170.
(3) 20 Ch. D. 151.
(4) 20 Ch. D. 169.
(5) 1 Cox, 213.
(6) Law Rep. 2 Ch. 737.

provision is made for the dissolution of the company in particular events and by a particular method; that provision is binding on all the shareholders; it is part of their original contract, which, as Lord *Cairns* pointed out in *In re Suburban Hotel Company* (1), must be regarded on such an application as the present one. The Court is always reluctant to interfere with the internal management of a company: *In re Langham Skating Rink Company* (2); *In re Middlesborough Assembly Rooms Company* (3). It would be throwing away money to make a winding-up order. A new company to carry on a bank at *Bristol* with a like capital could not be formed except at an expense of £1000; and the large sum which has been expended in preliminary expenses would be wasted.

Haldane, Q.C., and *Oswald*, for twenty-five shareholders, holding 605 shares:—

We also oppose the petition. It is a question for the shareholders what they shall do with their business. Insolvency is, as regards shareholders, merely a matter which goes to the prospects of success; it is, no doubt, to be looked at, but is merely evidence; it does not of itself justify shareholders in invoking the assistance of the Court. This is the first case where, there being such a reserve capital as is contemplated by the Act of 1879, a shareholder has petitioned for a winding-up order on the ground that the substratum of the company is gone. In order to make out such a case it must be shewn that the object of the company has either become impossible or has never come into existence. This is not a case like *In re Diamond Fuel Company* (4), where it was established that the business of the company was gone and could not be resuscitated. The business of this company, though carried on in an inexpensive way, is in existence, and resuscitation is therefore beside the question.

KEKEWICH, J.:—

I am of opinion that the winding-up order must be made.

This is a petition presented by a shareholder and supported

(1) Law Rep. 2 Ch. 742.
(2) 5 Ch. D. 669.
(3) 14 Ch. D. 104.
(4) 13 Ch. D. 400.

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by shareholders, and no creditor appears—at any rate, in the character of creditor. The shareholders do not all appear. There are more appearing in support of the petition than there are to oppose; but I must not, therefore, assume that the majority of shareholders support. If the shareholders desiring a winding-up were a legal majority, they would, no doubt, obtain a winding-up in a different way from that of a petition presented here to the Court. I think, however, that I must take it that those who do not appear here either to oppose or to support are not sufficiently careful about the result to think it necessary to express any opinion at all. Probably there are a few who from accident or disability are unable to express any opinion; but, eliminating those, the substantial result seems to be as I have stated.

In all these cases—that is to say, in all cases where a contributory has petitioned for a winding-up—the Court has referred to two matters which must from first to last be kept in view. The first is the unwillingness of the Court to interfere with shareholders in the management of their own affairs—and in their own affairs have been included the questions whether the business shall be continued or not, and whether, if the company is wound up at all, the winding-up shall be voluntary or by the Court. There are cases in which there has been no suggestion of any desire on the part of the shareholders that the winding-up should be a voluntary one, and where, therefore, the only question is whether there shall be a winding-up or a continuance of the business. That is the case here. Those who oppose the petition do not suggest that the company should be wound up voluntarily, but say that the business ought to be continued, and I have to deal with the petition and the opposition to it upon that footing. The other matter which the Court has kept in view, and apparently quite as much so as the unwillingness to interfere, is this, that there is jurisdiction in an extreme case to wind up a company at the instance of a contributory, and notwithstanding that he is not supported by a majority of the shareholders; and though the Court has expressed some considerable reluctance to exercise the jurisdiction, and has cautiously expressed the terms of its exercise, yet the existence of the jurisdiction has been sufficiently asserted. It was asserted by Lord *Cairns* in the case of *In re*

Suburban Hotel Company (1), where he refers to it more than once, viz., on page 745, and again on page 750, and it was referred to also by Vice-Chancellor *James* in *In re European Life Assurance Society* (2), where it is expressly stated on page 128. In the first case, and in several others to which there is no occasion to refer, the phrase used has usually been the "impossibility" of continuing the business. Lord *Cairns* says, in the first passage to which I have referred: "If there be a complete impossibility of pursuing the partnership business which was contemplated at the time the partnership was made, the Court, in the case of an ordinary partnership, would dissolve it, even without consent"—and he says this in reference to a joint stock company. It is not so easy to say what is meant by "impossibility." Several cases have come before the Court in which a conclusion has been arrived at as to the existence of the impossibility. I will take three as illustrations. The first is *In re Suburban Hotel Company* itself, in which Lord *Cairns* came to the conclusion that there did not exist a state of circumstances which made it impossible that the business of the company should be continued. The next is *In re Haven Gold Mining Company* (3), and the third is *In re German Date Coffee Company* (4). In *In re Haven Gold Mining Company*, the mine which the company was formed to work either did not exist, or at any rate, was not possessed, and could not be possessed, by the company; so that the physical substratum, the subject-matter in respect of which the company was formed, was altogether gone. In the case of *In re German Date Coffee Company* there was a patent in existence for making coffee out of dates; but the Court came to the conclusion that the company was formed in the first instance and essentially for working a German patent, and as the German patent had no existence, there again the subject-matter failed. So that we have in these two cases instances of either the physical substratum, or what was equivalent to the physical substratum, of the company being non-existent. But it is to be observed that in *In re German Date Coffee Company*, as also in *In re Suburban Hotel Company*, reference was made to *Baring* v. *Dix* (5), a very

(1) Law Rep. 2 Ch. 737.
(2) Ibid. 9 Eq. 122.
(3) 20 Ch. D. 151.
(4) Ibid. 169.
(5) 1 Cox, 213.

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much older case, decided in reference to an ordinary partnership, as stating the principle on which the Court proceeded, and there, notwithstanding the use of the word "invalid" in one passage in Lord *Cairns'* judgment in *In re Suburban Hotel Company* (1), I collect from the report in *Cox's* Reports that the patent was an existing patent, one that at any rate had not been successfully attacked, but that, as the report says, "the invention totally failed, and was now entirely given up," and there the Court directed an inquiry before the Master whether "the co-partnership business could now be carried on according to the true intent and meaning of the said articles of co-partnership." Therefore, I take the decision there to be that the entire failure of the patent, though it was still a patent in the eye of the law, was a ground for directing an inquiry whether there should not be a dissolution, with the intention that if the inquiry was answered by saying that there was no possibility of the partnership business being carried on the dissolution should follow. I take it, therefore, that notwithstanding that the instances with which the Court has had to deal, and to which I have referred as illustrations of the state of circumstances under which the Court has come to the conclusion that it was impossible to carry on the business of the company, have been cases in which that which either never existed or has ceased to exist has been the physical substratum of the company, or something equivalent to it, yet where the subject-matter of the company is gone, there the Court will wind up the company, not because some shareholders desire it, and some not, but because that which the company was formed to do can no longer be done; and if the Court comes to the conclusion that that is the real state of the case, then it has jurisdiction, and is bound to exercise jurisdiction to wind up the company.

Before applying that principle to the facts of this case, I must advert to a matter to which I called Mr. *Haldane's* attention just now, and to which he referred, as did also Mr. *Oswald*, and which was mentioned by Mr. *Rigby* in the first few words of his address in opening the case. This is a case entirely different, so far as I am aware, from any other case which has yet been presented to the Court, because I am not aware, and counsel also

(1) Law Rep. 2 Ch. 744.

are not aware, of any case in which a contributory has asked the Court to wind up a company possessing what is called a reserve capital. The chartered companies which were formed on the principle of there being a certain amount of the original subscription available in event of liquidation were wound up sometimes by the Court, but always, I believe, on the application of creditors. The *Companies Act*, 1879, has not long been in existence, and I am not aware of any case in which a contributory of such a company has come before the Court and said, "I decline to allow my credit to be further pledged as regards the amount which I am bound to subscribe to the liability of the company in the event of a winding-up."

The distinction drawn by the Court has been between a petition to wind up a limited company and one for the winding-up of an unlimited company; and as I understand the distinction it is this—that a shareholder is bound to contribute to the extreme limit of his limited liability to enable the business to go on, and that he cannot be heard to say that because he would rather not pay up his shares in full the amount which he has agreed to contribute shall not be contributed to assist those who do continue, in effecting their desire. It is part of his contract to pay up so much per share so long as the company continues, and he is bound to fulfil that contract. As regards unlimited companies, other considerations are allowed to intervene. I need not dwell upon those. But here I find an entirely different case. A shareholder is bound to pay up, and has paid up, £5 per share, and he is bound to pay another £5 a share if and when the company is ordered to be wound up. I think I must inquire what is the precise contract into which he has entered—not the contract with the creditors, about that there is no question, but the contract between the partner and his co-partners, whom he meets here and who are concerned in the question whether the company should be wound up or not. The question of the shareholders' contract was discussed by Lord *Cairns* in the case of *In re Suburban Hotel Company* (1), where he states the position of the shareholder as regards the case of a limited company not having this reserve capital. It was also, I think, discussed in *In re European Life Assurance*

(1) Law Rep. 2 Ch. 737.

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Society (1) by Vice-Chancellor *James;* but it is to be observed that the contract there was with a policy-holder—that is a creditor—and not between the shareholders *inter se.* I understand the contract of a shareholder with his partners as regards the reserved capital to be that the business shall be conducted with a certain amount of capital, of which he is to contribute a fixed proportion, and on the faith of the credit attaching to his liability to contribute a further sum in the event of a winding-up. But what is said as against that amounts to this—that there is a further contract that the business shall be carried on, notwithstanding that the original capital has been exhausted, so as in that way to bring into active operation the contingent liability to contribute in the event of a winding-up. That seems to me to be putting the reserve capital on precisely the same footing as the original capital, and making it part of his contract that he shall allow the business to be continued at all hazards whether he approves or not, and not for the purpose of paying existing debts, but of enabling the company to incur debts to which he may be liable to contribute. To my mind, that is not the contract into which he has entered. Mr. *Marten* referred to the articles of association, and particularly to art. 126. That article refers to the dissolution of the company in certain events; but it does not seem to me to exclude the jurisdiction of the Court if the case is made to fall within the Act of Parliament. In other words, it seems to me that if the contract is that which I hold it to be, then a shareholder is entitled to invoke the jurisdiction of the Court, notwithstanding that one of the terms of the contract is that while the business is being continued he cannot insist on the winding-up except in the events mentioned in art. 126. Here I have a state of things which seems to me not only to justify me in exercising the jurisdiction, but to compel me to do so. I take the balance-sheet of last year. I have heard affidavits and comments on affidavits to the effect that that which has been represented by the directors to be the true state of things is not true in this sense, that the assets are more valuable than is there stated. It is exceedingly dangerous to take explanations made for the purpose of this petition of what ought to have been a true statement

(1) Law Rep. 9 Eq. 122.

to the shareholders at the end of last year; but to my mind there is a far more complete and satisfactory answer than that to all the arguments on this point. I have not heard a line of affidavit, I have not heard even a statement of counsel speaking on instructions, of any intention of putting into an affidavit any statement that a single penny of these bad debts has been recovered since last year, and I take it that if Mr. *Hale*, the chairman, who has made affidavits, had been able to say, not merely as a matter of estimate, that a considerable sum might be recovered, but, as matter of fact, that in the interval a considerable sum which it was not expected to recover had been recovered, he would have done so. I take it, therefore, that as regards the bad and doubtful debts the statement made to the shareholders is true, as of course it ought to have been. Then as regards the other assets, the only one about which there is any question to be made is that of preliminary expenses. It appears, according to one of the articles of association, that the directors were empowered to distribute the preliminary expenses over a series of years. That seems fair and reasonable, and cannot be objected to as it is provided for by the articles of association. The preliminary expenses of starting a business which is intended to be large are considerable; and there may be—I do not say there is, but there may be—some unfairness in writing all those as against capital, and there is still more likely to be unfairness in writing them against the profits of any one year. It may be a fair bargain between the partners or shareholders to distribute them over several years, so as to enable the company to declare a dividend in each of those years if profits render it proper to do so; but the money is none the less gone because it is distributed over a series of years; the preliminary expenses are not the less paid because they are attributed to one year rather than another. The £3800 for preliminary expenses is none the more an asset of the company because some part of it may be properly treated as having been paid in the present year. The £3800 put down as preliminary expenses is positively gone, and cannot for any purpose be treated as an asset of the company. The result is that there is surplus of a about £300, or, speaking with precision, £337 1*s.* 9*d.*, on paper. Part of that consists of office furniture; that is a small matter,

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no doubt, but still it is only on paper. The cash is in the hands of agents, and may or may not be recoverable in its entirety. But putting it at its best, there was at the end of last year a surplus of £337 1*s.* 9*d.* Now until this morning I felt bound to consider that as against that there came a debt of something like £1100 or £1200 payable to the directors for their remuneration, which I have been told they did not demand, and for very good reason. But I am also told this morning that they do not wish to insist on payment unless the company is wound up. Previously it was stated to me in the alternative, "or unless the company becomes successful," which of course is the only other event in which it was possible that they should be paid. But now they have gone further, and said that they do not wish to insist on their remuneration unless the company is wound up. The result is that no debt of the kind is now payable; it is now a debt which must be deemed to have been paid. I pass, therefore, over the subject of debts with this remark, that I cannot follow, or rather I cannot adopt, Mr. *Marten's* argument that inability to pay debts means not debts which are demandable, but debts which have been actually demanded. Vice-Chancellor *James*, in *In re European Life Assurance Society* (1), explains precisely what inability to pay debts means; but there is not a word in his judgment to justify the proposition that debts must not only be demandable, but actually demanded, in order to come within the term "debts" as mentioned in the Act of Parliament. This particular sum is not at any rate now a demandable debt, but only a sum to be provided for in the event of the company being wound up. The company is entitled to the benefit of that to this extent, that, at least on paper, there is a surplus of £337 1*s.* 9*d.*, assets with which to continue the business. On the other hand, I find that the company never have really made any profits at all. There is a paper profit of a small amount—£86 odd—last year; but it cannot be said that they have ever made a profit. It can, on the other hand, be said that they have been going on in this way from year to year. They have been in existence for six years, and on the average of the expenditure for the past years the surplus of £337 1*s.* 9*d.* will be gone in less than a third of a year—that

(1) Law Rep. 9 Eq. 122.

is to say, it may fairly be treated as gone at the present time. But then I am told that there are two or three reasons why the company ought not to be treated as in hopeless insolvency. In the first place, it is said there is the prospect of a transfer to another bank. It is hardly conceivable that any bank would give anything for a business which really does not exist, and probably nothing could be said of negotiations alleged to have taken place. Then I am told that they may carry on a better business in future; that they have up to this time done their best to reduce the expenses; that they have deserted a more expensive house; that they have dispensed with the original establishment, and the business is being conducted in a most economical way. No doubt it is. It is carried on in an office which appears not to be in a principal street, and is rented at £28 a year and attended by a person who may or may not be properly described as an "office boy," but who at any rate is the only representative of a bank established with an issuable capital of £200,000. But it was argued that there is a large capacity to issue capital, and that there is a large capital in reserve, and that this may be available for the extension of the business. It is drawing on one's imagination to suppose that a bank which has been in business for six years, which has expended (with the exception of £337 1*s.* 9*d.*) the whole of its paid-up capital of £12,000, which has not yet made profits so as to declare a dividend, whose shares have been sold, it is said, for 2*s.* 6*d.* a share, but have been returned, on the authority of the chairman himself, to the Inland Revenue as worthless—that such a bank can issue further capital. The legal capacity to issue capital there no doubt is; practical capacity there certainly is not.

Does then this state of circumstances bring the case within the principle to which I have referred? Is the substratum of the company gone? Is the subject-matter of the company gone? I am perfectly well aware that in answering that question in the affirmative I am going beyond the decisions in *In re Haven Gold Mining Company* (1), and *In re German Date Coffee Company* (2); but I believe I shall be deciding according to the views of Lord *Cairns* in *In re Suburban Hotel Company* (3), and of Vice-

(1) 20 Ch. D. 151. (2) 20 Ch. D. 169. (3) Law Rep. 2 Ch. 737.

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Chancellor *James* in *In re European Life Assurance Society* (1), and according to the principle embodied in the short report of *Baring* v. *Dix* (2). I must not forget that this is a bank. I must not forget —one must know, does know—what are the essentials of carrying on a banking business satisfactorily. There may be a further struggle; but I cannot conceive it as possible—I say it is impossible for the company to continue its business satisfactorily because it has not that without which a banking business cannot be carried on. Then I am met by the consideration that many of the shareholders desire that it should be carried on. Several of them come here and oppose the winding-up petition. I have already referred to the unwillingness of the Court to interfere with shareholders in the conduct of their affairs. I do not for a moment wish to depart from anything that has been said on the subject; but I say that this is a peculiar case. The shareholders have entered into a contract of a peculiar kind such as I have explained—a contract not of such an extent as is argued on behalf of those who oppose the petition. I think a shareholder is entitled to come here—certainly he is if supported by several other shareholders, I do not say that a single shareholder would be so entitled—and say, "I will not have this business carried on without any reasonable hope of success in order that at some uncertain time hereafter my further capital"—the reserve capital —"may be called up and used in payment of debts which ought not to be incurred." On these grounds, I think that there must be the usual winding-up order.

An appeal from this decision was presented and withdrawn.

Solicitors: *Mackrell, Maton, & Godlee,* agents for *H. C. Trapnell, Bristol; Meredith, Roberts, & Mills,* agents for *W. H. Brown, Bristol; Herbert F. Oddy.*

(1) Law Rep. 9 Eq. 122. (2) 1 Cox, 213.

C. C. M. D.

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ARBITRATION—*Injunction—Agreement to refer—Staying Legal Proceedings by Party to Agreement—Discretion of Court—Question of Law—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 4, 19.] Under sect. 4 of the Arbitration Act, 1889, the Court has a discretion as to staying legal proceedings commenced by one party to a submission to arbitration against the other party.—A deed of partnership between four partners contained a clause providing that, whenever any difference should arise between all or any of the partners, or between any of them and the executors or administrators of any other or others of them, touching the construction of the deed, or anything therein contained, or any account, valuation, &c., or any other thing in anywise relating to the partnership, or the business or affairs thereof, such dispute should be referred to arbitration, pursuant to the provisions of the Common Law Procedure Act, or any then subsisting statutory modification thereof. After the death of two of the partners, the executors of one of them commenced, in November, 1889, an action against the two surviving partners and the executors of the other deceased partner, claiming payment from the Defendants, jointly and severally, of a sum which the Plaintiffs alleged to be due to them as executors in respect of their testator's share and interest in the partnership. Before the delivery of any defence two of the Defendants, in December, 1889, took out a summons asking that, pursuant to sect. 11 of the Common Law Precedure Act, 1854, all proceedings in the action might be stayed, and the matter in dispute referred to arbitration.—The summons came on for hearing after the commencement of the Arbitration Act, 1889.—The Court being of opinion that the matter in dispute was one of law arising on the construction of the deed, ordered the summons to stand over till after delivery of the defences, in order that application might then be made to the Court to decide any question of law raised by the pleadings, before referring it if necessary to an arbitrator to decide any matter of account. *In re* CARLISLE. CLEGG *v.* CLEGG - - 200

2. —— *Injunction — Partnership — Jurisdiction.*] The Court has jurisdiction to restrain a

ARBITRATION—*continued.*
party from proceeding to arbitration, and will exercise that jurisdiction at the instance of one of the parties to the agreement for reference in a proper case, such as where it is satisfied that injury will result to the party complaining if the arbitration is allowed to proceed: but the Court will not exercise its jurisdiction where it sees the result of the arbitration will be merely futile and productive of no injury to the party complaining.—Articles of partnership between three partners, A., B. and C., provided that, as to any question in relation to the partnership, the decision of the majority should prevail; and further that, in case of any dispute between the partners, they should appoint three arbitrators, one to be appointed by each partner, and that the partners should abide by the award. Subsequently A. and B. gave C. notice of their appointment of two arbitrators, and requested him to appoint a third to decide disputes which they alleged had arisen between themselves and C. C. denied the existence of any dispute requiring arbitration, and requested A. and B. to furnish him with particulars of the alleged disputes, which, however, they declined to do until C. had appointed his arbitrator, and they threatened that if he did not appoint his arbitrator they would proceed to arbitration before their own arbitrators.—On a motion by C. to restrain A. and B. from proceeding to arbitration:—*Held*, that, as in C.'s absence any arbitration proceedings would be futile and in no way binding upon him, the Court ought not to grant an injunction. FARRAR *v.* COOPER [323

ASSIGNMENT—Lease—Part of land—Apportioned rent - - - - 146
See LANDLORD AND TENANT.

—— Lease of public-house—Covenant - 503
See COVENANT. 2.

ATTACHMENT—Service of notice - 151
See PRACTICE. 1.

BOATS—Right of boating on river - 110
See RIVER.

BUILDING SOCIETY—*Deed of Dissolution—Statutory Majority of Members—Withdrawing Member—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 32, *sub-s.* 3.] The rules of a benefit building society provided that a member who had given notice of withdrawal should cease to take part in the affairs of the society:—*Held* (affirming the decision of North, J.), that members who had given notice of withdrawal, but had not received their money, were still members of the society, and were to be taken into account in ascertaining the statutory majority of the members required by the Building Societies Act, 1874, s. 32, to sign an instrument of dissolution.—*In re Sheffield and South Yorkshire Permanent Building Society* (22 Q. B. D. 470) explained. SIBUN *v.* PEARCE [C. A. 354

2. —— *Directors—Power to make Advances on Legal or Equitable Mortgage of Leaseholds—Advance on Security of Leasehold Colliery—Second Mortgage—Redemption of First Mortgagee—Borrowing Money—Expenditure for Protection of Security—Misfeasance—Ultra Vires—Negligence*

BUILDING SOCIETY—*continued.*
—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 13, 16, 25.] The directors of a benefit building society, having a large discretion vested in them as confidential agents, may properly make advances on classes of securities forbidden to ordinary trustees, and are not precluded from making advances on securities of a speculative nature.—By the rules of a building society constituted under the Act of 1874, with the object of raising by the subscriptions of the members a fund for making advances to members on mortgage (inter alia) of leasehold estate, it was provided amongst other things (*a*) that none of the directors should be answerable for any act or default of any other of them or for the insufficiency or deficiency in title of any security taken for the repayment of any advances, unless the loss should happen through their own neglect or default; (*b*) that the board should have power to conduct the affairs of the society according to its rules, to appoint agents and committees of directors, and to invest the funds of the company not immediately required for its purposes according to sect. 25 of the Act of 1874 (which authorized investments in leasehold securities); (*c*) that the solicitor of the society should investigate the title to all property offered as security and prepare all mortgages; (*d*) that the funds of the society should be applied at the discretion of the board in making advances to members in respect of the shares held by them on (inter alia) legal or equitable mortgage of leasehold property, and (*e*) that when the directors were of opinion that the premises were a sufficient security, and the solicitor was satisfied that the title to the property was satisfactory, the amount granted should be paid to the borrower on his executing a mortgage in the form required by the solicitor. In 1878 the directors advanced £25,000 to one J. upon two securities, the principal of which was a second mortgage of a leasehold colliery, taking at the same time as collateral security a charge upon certain beneficial interests under a trust of personal estate. During the transactions which resulted in the advance, the chairman of the board was in direct communication with the borrower, and took an active part in inquiring into the nature and value of the security; while the other directors simply exercised in good faith their judgment on the materials submitted to them; and the advance was made upon a valuation and report by a competent surveyor selected by the chairman from five surveyors whose names were submitted by the borrower:—*Held* (1), that an advance upon the security of a leasehold colliery was not ultra vires the society.—(2.) That the inclusion of the interests in personal estate as collateral security did not ex necessitate vitiate the whole loan, though the propriety of the transaction must be tested as if no such ingredient entered into it.—(3.) That it was within the powers of the directors to accept a leasehold colliery as security for an advance.—(4.) That as the rules of the society did not limit the directors to securities under which a legal estate would be vested in them, and the risk of foreclosure by the first mortgagee was one which a man of business and ordinary prudence might be willing to incur, the directors were not guilty of negligence in

BUILDING SOCIETY—*continued.*

acting on the report of the surveyor, and taking a second mortgage as their principal security.—(5.) That the chairman, against whom the action came on in default of pleading to allegations that the advance was made upon improper security, was, but that the other directors were not, liable to make good to the society the loss of the sum advanced.—In 1881 the first mortgagees of the principal colliery comprised in the society's security threatened to foreclose, and the directors made a further advance to J. of £41,000, £40,000 of which they borrowed for the purpose under their borrowing powers; and they subsequently entered into possession of the colliery, and paid an arrear of wages then due to the colliers, and they further expended considerable sums in payment of rents and royalties, and in working and maintaining the colliery until the society went into liquidation:—*Held* (1), that, as the first advance was within their powers, the directors had power by implication to do those things which might result from the working out of the relation subsisting between first and second mortgagees, and accordingly had power to redeem the first mortgagee, and to exercise their borrowing powers for the purpose of paying them off.—(2.) That they also had power to enter into possession of the mortgaged property and to pay out of the assets of the society the rents reserved by the lease, and the proper expenses of maintaining and working the colliery without rendering themselves liable for such expenditure; but (3) that an inquiry must be directed as to the sum paid by the directors for arrears of wages when they took possession, as such payment was not one for which there was a potential necessity.—*Small* v. *Smith* (10 App. Cas. 119) and *Royal Bank of India's Case* (Law Rep. 4 Ch. 252) explained. SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY *v.* AIZLEWOOD - - 412

—— Mortgage—Power of Sale - - 492
See MORTGAGE. 3.

CALLS—Unpaid Mortgage of—Winding-up—Priority - - - - 534
See COMPANY. 3.

CASES—*Andrew* v. *Andrew* (1 Ch. D. 410) distinguished - - - - 154
See WILL. 4.

—— *Carter* v. *Beard* (10 Sim. 7) doubted 95
See LUNATIC.

—— *Cochend* v. *Mullis* (3 C. P. D. 439) considered - - - - 211
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—— *Daley* v. *Desbouverie* (2 Atk. 261) followed [654
See WILL. 1.

—— *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (Law Rep. 2 Ex. 158) distinguished - - - 472
See COMPANY. 1.

—— *Doe* v. *Reid* (10 B. & C. 849) distinguished [503
See COVENANT. 2.

—— *Dowling* v. *Pontypool, Caerleon, and Newport Railway Company* (Law Rep. 18 Eq. 714) followed - - - 330
See RAILWAY COMPANY. 1.

CASES—*continued.*

—— *Dreyfus* v. *Peruvian Guano Company* (42 Ch. D. 66; 43 Ch. D. 316) distinguished [694
See INTEREST.

—— *Gough's Trusts, In re* (24 Ch. D. 569) dissented from - - - 316
See LANDS CLAUSES ACT.

—— *Hallows* v. *Fernie* (Law Rep. 3 Eq. 520, 536) dictum followed - - 472
See COMPANY. 1.

—— *Haywood* v. *Brunswick Permanent Benefit Building Society* (8 Q. B. D. 403) distinguished - - - - 503
See COVENANT. 2.

—— *Hendriks* v. *Montagu* (17 Ch. D. 638) followed - - - - 678
See COMPANY. 4.

—— *Howard* v. *Patent Ivory Manufacturing Company* (38 Ch. D. 156) followed - 534
See COMPANY. 3.

—— *Hussey* v. *Horne-Payne* (4 App. Cas. 311) followed - - - - 616
See VENDOR AND PURCHASER. 2.

—— *Jones* v. *Bone* (Law Rep. 9 Eq. 674) distinguished - - - - 244
See COVENANT. 1.

—— *Jones, Ex parte* (18 Ch. D. 109, 122) considered - - - - 211
See INFANT.

—— *Jones' Trust, In re* (18 W. R. 312) not followed - - - - 316
See LANDS CLAUSES ACT.

—— *Lybbe* v. *Hart* (29 Ch. D. 8) dictum questioned - - - - 503
See COVENANT. 2.

—— *Marshall* v. *Ulleswater Steam Navigation Company* (Law Rep. 7 Q. B. 166) considered - - - - 110
See RIVER.

—— *Mead, In re* (15 Ch. D. 651) distinguished [77
See DONATIO MORTIS CAUSÂ.

—— *Norton Iron Company, In re* (47 L. J. (Ch.) 9) followed - - - - 140
See COMPANY. 8.

—— *Phœnix Bessemer Steel Company, In re* (44 L. J. (Ch.) 683) followed - - 534
See COMPANY. 3.

—— *Royal Bank of India's Case* (Law Rep. 4 Ch. 252) explained - - 412
See BUILDING SOCIETY. 2.

—— *Selwyn* v. *Garfit* (38 Ch. D. 273) considered [492
See MORTGAGE. 3.

—— *Sheffield and South Yorkshire Permanent Building Society, In re* (22 Q. B. D. 470) explained - - - - 354
See BUILDING SOCIETY. 1.

—— *Small* v. *Smith* (10 App. Cas. 119) explained [412
See BUILDING SOCIETY. 2.

—— *Steel* v. *Dixon* (17 Ch. D. 825) followed [168
See PRINCIPAL AND SURETY.

—— *Trades Bank Company, In re* (W. N. 1877, 268) explained - - - 140
See COMPANY. 8.

—— *Tulk* v. *Moxhay* (2 Ph. 774) followed 503
See COVENANT. 2.

CASES—*continued.*

—— *United Horse Shoe and Nail Company* v. *Stewart* (13 App. Cas. 401) distinguished *See* PATENT. 2. [274

—— *United Ports and General Insurance Company, In re* (39 L. J. (Ch.) 146) not followed - - - - 140
See COMPANY. 8.

—— *Weaver, In re* (21 Ch. D. 615) explained *See* LUNATIC. [95

—— *Wharton* v. *Barker* (4 K. & J. 483-502) distinguished - - - 484
See WILL. 2.

CERTIFICATE—Patent action—Vexatious proceedings—Costs - - - 224
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CHAMBERS—Practice in - 128, 236, 253
See PRACTICE. 2, 5, 6.

CHEQUE—Donatio mortis causâ - - 76
See DONATIO MORTIS CAUSÂ.

CLASS—Period of ascertaining - - 484
See WILL. 2.

CLUB—*Proprietary Club—Member no right of Property—Expulsion of Member by a Committee—Irregularity of Proceedings by Committee not properly constituted—Damages and not Injunction.*] In the case of an ordinarily constituted club, in which members have rights of property, a member whose rights have been interfered with by the committee is entitled to ask the Court to consider whether the rules of the club have been observed; whether anything has been done which is contrary to natural justice; and whether the decision complained of has been come to bonâ fide; but in the case of a proprietary club, in which members have no right of property, a member who has been expelled by a committee, though the proceedings were irregular, cannot obtain relief by way of injunction, but will be left to obtain it in damages.—Appeal of the Plaintiff dismissed, on his own application, with costs. BAIRD *v.* WELLS - - - 661

COMPANY—*Appointment of First Directors—Validity—Contributory—Evidence—Allotment of Shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 154, *Table A, Arts.* 52, 53, 58, 61, 62, *and* 66.] The seven subscribers to the memorandum of association of a company, regulated by Table A, without meeting together for the purpose, all signed a document in writing, dated the 27th of July, 1888, appointing four persons to be the first directors of the company, and these four persons met and resolved that two directors should form a quorum to transact the business of the company.—At the first ordinary meeting, which was held on the 20th of August, 1888, these four persons did not retire from office as provided by art. 58 of Table A; but a resolution was passed at the meeting authorizing them to continue to act as directors; and two of those four persons on the same day allotted to C. K., an applicant, 200 ordinary shares in the company:—*Held*, first, that as the subscribers to the memorandum of association had all concurred in appointing the first directors of the company, the fact that they had not met together for the purpose of coming to their determination did not invalidate their act, and, accordingly, that the appointment in writing of the 27th of July, 1888, was good:—*Held*, secondly, that the resolution passed at the general meeting of the 20th of August, 1888, was valid to the extent of continuing in office the then present directors:—*Held*, thirdly, that Art. 62 of Table A, which provides that, if at any meeting at which the election of directors ought to take place the places of the vacating members are not filled up, the meeting shall stand adjourned till the same day in the next week, and further provides as therein mentioned, is directory only; and that the meaning of that article is, that if for any reason either the first meeting, or the adjourned meeting at which the election of directors ought to take place, does not proceed validly to fill up the places of the vacating directors, then they are to continue in office:—And, *held*, accordingly, that the four directors were validly in office on the 20th of August, 1888, and that the allotment of 200 shares made to C. K. by two of these four directors was valid.—C. K. afterwards, as he admitted, applied for 300 preference shares, and received an allotment of them. By the company's allotment book it appeared that 300 shares were allotted to him on the 29th of September, 1888, but no minutes were kept after the 20th of August, 1888. The company was afterwards ordered to be wound up, and at that time C. K. was on the register of shareholders as the holder of 500 shares. C. K. disputed the validity of both allotments to him:—*Held*, that as C. K. was a contributory in respect of his 200 shares, the allotment book of the company was, under sect. 154 of the Companies Act, 1862, primâ facie evidence against him of an allotment to him on the 29th of September, 1888, and that, although there was no record of any board or committee meeting on that day, the entry in the allotment book, coupled with his admission, threw upon him the burden of proving that the allotment was invalid; and that, not having discharged it, he must be settled upon the list as a contributory for the 300 shares as well as the 200 shares.—*D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (Law Rep. 2 Ex. 158) distinguished.—*Dictum* of *Wood*, V.C., in *Hallows* v. *Fernie* (Law Rep. 3 Eq. 520, 537) adopted and followed. *In re* GREAT NORTHERN SALT AND CHEMICAL WORKS. *Ex parte* KENNEDY - - 472

2. —— *Illegal Contract—Lottery Loans—Prospectus—Advertising Foreign Lottery—Lottery Acts*, 9 *Geo.* 1, *c.* 19, *s.* 4—6 & 7 *Will.* 4, *c.* 66.] A company, formed to acquire and work a concession conferring the exclusive privilege of conducting all operations in connection with lottery loans in Persia, issued a prospectus which referred to the profits made on the Continent by lotteries, and stated that the operations of the company would be conducted upon the lines adopted by European states where government lotteries were in vogue, and that "at least five issues have to be made annually in Persia with minimum drawings of £10,000, and it is estimated that these operations should return continuously increasing dividends." The company had agreed to purchase this concession. A shareholder commenced an

COMPANY—*continued.*

action to restrain the company from acquiring, and from publishing any prospectus or scheme relating to the acquisition of this concession, and from publishing any advertisement or notice in any manner relating to such lottery loans, and from applying the funds of the company in the purchase of the said concession, contending that the enterprise of the company was illegal and in contravention of the Lottery Acts:—*Held*, that the proposed purchase of the concession was lawful: that the company were not attempting to erect or set up any lottery in this country within the meaning of 9 Geo. 1, c. 19, s. 4: that the general statements in the prospectus did not amount to a publication, advertisement or notice of a foreign lottery within the meaning of 6 & 7 Will. 4, c. 66: and that the action must therefore be dismissed. MACNEE *v.* PERSIAN INVESTMENT CORPORATION - - - - - - **306**

3. —— *Mortgage—Ultrà Vires—Future Calls—Unpaid Capital—Winding-up—Shareholder—Mortgagees—Set-off—Creditors—Priority—Pari Passu—"Calls"—"Assets"—"Capital"—Companies Clauses Consolidation Act*, 1845, *s.* 38—*Companies Act*, 1862, *ss.* 7, 8 *sub-s.* 5, 9 *sub-s.* 4, 12, 14, 16, 26, 38, 75, 94, 95, 98, 101, 102, 133—*Companies Act*, 1867, *s.* 25—*Companies Act*, 1879, *s.* 5.] The memorandum of association of a limited company stated one of its objects to be "to borrow money by mortgage or otherwise, and issue mortgage debentures or any other securities founded or based upon all or any of the real and personal assets." By the articles the directors were empowered to "borrow on mortgage of all or any part of the property of the company," and to include in any such mortgage "all or any definite proportion of the capital of the company then uncalled."—In 1882 the company, to secure an advance, mortgaged "the uncalled amounts" of £4 per share on certain shares partly called up, and "all the personal property, assets, and effects which now or at any future time during the continuance of this security shall belong to the company."—In 1886 and 1887 the company executed further mortgages of "the said uncalled amounts" of £4 per share to other persons, some of whom were themselves shareholders.—In 1889 a compulsory order was made for winding up the company, the £4 per share being then still uncalled. The question then arose whether the several mortgagees were entitled to have the calls to be made by the liquidator in the winding-up applied in payment of their mortgage debts in priority to the unsecured creditors:—*Held*, by the Court of Appeal (affirming Stirling, J., Lopes, L.J., dubitante), that the calls to be made by the liquidator in the winding-up, including the calls on the shares of such of the mortgagees as were shareholders, were bound by the mortgages, and that the several mortgagees were entitled to have the calls applied in payment of their mortgage debts in priority to the general creditors.—Per Cotton and Lindley, L.JJ.:—There is nothing in the Companies Act, 1862, or the subsequent amending Acts, expressly or by necessary implication prohibiting a limited company from mortgaging its unpaid-up capital; consequently, where power to mortgage future or unpaid-up

COMPANY—*continued.*

capital is given by the memorandum or articles of association, a mortgage by the company of its future or uncalled capital is valid, even as against creditors in a winding-up, the calls in a winding-up being part of the "assets" or "capital" of the company.—*In re Phœnix Bessemer Steel Company* (44 L. J. (Ch.) 683; 32 L. T. (N.S.) 154), and *Howard* v. *Patent Ivory Manufacturing Company* (38 Ch. D. 156) followed. *In re* PYLE WORKS - - - - - - **C. A. 534**

4. —— *Registration—Companies Act*, 1862, *s.* 20—*Intended Registration of New Company—Similarity of Names—Injunction granted to restrain Registration.*] A company, "Madame Tussaud & Sons, Limited," registered under the Companies Act, 1862, was granted an injunction to restrain the registration of a proposed new company, "Louis Tussaud, Limited," which was promoted by Louis J. Tussaud and friends, for the purpose of carrying on a similar business or exhibition to that of "Madame Tussaud & Sons," and in which Louis J. Tussaud was to be manager.—Whether, if Louis Tussaud had originally commenced and carried on business of a similar character in his own name and on his own account, and had taken partners, and as "Louis Tussaud & Co." they had transferred the business and goodwill to a company, of which Louis Tussaud was to be a paid servant, that company would have been prevented by injunction from proceeding to registration of it under his name as a limited company, *quære.*—*Semble*, that Louis Tussaud could not for valuable consideration or otherwise confer on another person the right to use the name of Tussaud in connection with a business which he had never carried on and in which he had no interest whatever.—Order made in *Hendriks* v. *Montagu* (17 Ch. D. 638) followed. TUSSAUD *v.* TUSSAUD - - - - **678**

5. —— *Winding-up—Arrangement with Creditors—Sanction of Court—Jurisdiction—Debenture-holders—Power to sanction Scheme depriving Debenture-holders of their Security—Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *s.* 2.] The power given to the Court by the Joint Stock Companies Arrangement Act, 1870, to sanction a scheme between a company and its creditors, extends to debenture-holders, and the Court has jurisdiction to deprive dissentient debenture-holders of their security, and to sanction a scheme which provides that they shall accept fully paid shares in satisfaction of their claims.—But the Court will not sanction a scheme merely because it has been approved by a large majority of creditors; it will require to be satisfied that the proposed arrangement is fair and equitable. *In re* EMPIRE MINING COMPANY **402**

6. —— *Winding-up—Just and equitable Cause—Substratum gone—Petition—Rehearing—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 8, *sub-ss.* 1, 3, *s.* 79, *sub-s.* 5—*Memorandum of Association—Construction.*] The name of a company is important in construing the objects defined in the memorandum of association.—A statement in the memorandum of association of a company that its objects were to carry on any business that the company might think profitable would not be such statement of objects as is required by the

COMPANY—*continued.*

Companies Act, 1862.—Where a company has ceased to carry on its proper business, but carries on a business ultra vires, a shareholder is not confined to a remedy by injunction, but is entitled to have the company wound up.—A company was registered under the name of the Mid-Northamptonshire Bank, Limited. In addition to wide and general objects, the memorandum of association stated particularly numerous objects of diverse character in fifteen paragraphs. The first three paragraphs related to banking, discounting, and money-lending, and borrowing respectively; others referred to purchasing and developing land, investing and dealing in shares and securities, and promoting companies. The company commenced business as a country bank in Northamptonshire, with an office in London. After a short time its name was changed to the Crown Bank, Limited; it gave up its country offices, ceased to do banking business, and carried on in London, in addition to some land speculation and business connected with promoting a foreign company, the business of investing in shares and securities.—On a petition by a shareholder to wind up the company on the ground that its main objects had failed:—*Held*, that the company were not carrying on a business authorized by the memorandum of association, and that it was just and equitable that the company should be wound up.—Where an order for winding up a company had been delivered out, but not passed and entered, the Court by consent dismissed the petition. *In re* CROWN BANK - 634

7. —— *Winding-up — Shareholder's Petition —Impossibility of carrying on Business—Substratum gone—Reserve Capital—Companies Act*, 1879 (42 & 43 *Vict. c.* 76), *s.* 5—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 79, *sub-s.* 5.] Where by the constitution of a limited company a portion of its uncalled capital is not capable of being called up, except in the event of and for the purpose of the company being wound up, the contract of a shareholder with his fellow-shareholders as regards such reserve capital is that the business of the company shall be carried on with a certain amount of capital, of which he is to contribute a fixed proportion, and on the faith of the credit attaching to his liability to contribute a further proportion in the event of a winding-up; but it is not a part of his contract that the business shall be carried on, notwithstanding that the original capital has been exhausted, so as in that way to bring into active operation the contingent liability to contribute in the event of a winding-up.—Consideration of the principles by which the Court is guided in deciding whether or not a company ought to be wound up on the petition of a shareholder.—A banking company had a capital of £24,000 in 2400 shares of £10 each, of which £5 was paid and the other £5 was not to be called up except in the event of and for the purposes of the company being wound up. The company had been in existence for six years, but had never made any profit, and its business, which had commenced with a considerable staff in extensive premises, was now being carried on in small premises, attended by a single clerk. From the last balance-sheet of the company it appeared that all the paid-up capital except £337 had been exhausted. Three months after the date to which the balance-sheet was made up a shareholder presented a petition for the winding-up of the company. The petition was supported by a considerable number, but not a majority, of shareholders. No creditor appeared:—*Held*, that it was impossible that the business of the company could be carried on with any reasonable hope of success, and that under the circumstances a winding-up order ought to be made. *In re* BRISTOL JOINT STOCK BANK 703

8. —— *Winding-up—Two Petitions—Advertisement—Priority—Costs.*] A creditor, presenting a winding-up petition, with notice that another creditor has already presented a petition with the same object, does so at his own risk as to costs, and must prove, not merely that he has reason to suspect that the first petition was not bonâ fide presented, but that mala fides or collusion actually exists: *In re Norton Iron Company* (47 L. J. (Ch.) 9 followed.—Where two or more petitions are presented, they will, in the absence of mala fides, take priority according to their dates of presentation, not according to their dates of advertisement: *In re United Ports and General Insurance Company* (39 L. J. (Ch.) 146) discussed, and not followed.—*In re Trades Bank Company* (W. N. 1877, p. 268) explained. *In re* BUILDING SOCIETIES' TRUST, LIMITED - 140

COMPENSATION—Minerals wrongfully worked *See* INTEREST. [694

CONDITION—Will—Marriage with consent of trustees - - - - 654
See WILL. 1.

CONSENT—Trustees—Marriage—Condition in Will - - - - - 654
See WILL. 1.

CONTEMPT OF COURT—*Newspaper Comments on pending Proceedings—Fine.*] Comments were made in a newspaper on a pending petition by a shareholder to wind up a banking company; with reference to an intended cross-examination of directors it was said, "if they are compelled to make a full statement of the affairs of the bank we shall have some interesting revelations." Previously to the presentation of the petition a series of articles calling in question the conduct of the directors had appeared in the newspaper. The Court found that the articles had been instigated by the petitioning shareholder.—On motion to commit the publisher of the newspaper for contempt of Court he was ordered to pay a fine of £50 and costs. *In re* CROWN BANK. *In re* O'MALLEY - - - - - 649

CONTRACT—By letters - - - 616
See VENDOR AND PURCHASER. 2.

—— Illegal—Lottery - - - 306
See COMPANY. 2.

—— Sale of land—Title - - - 218
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CONTRIBUTION — Apportioned rent — Assignment of part of land - - 146
See LANDLORD AND TENANT.

—— Co-surety - - - - 168
See PRINCIPAL AND SURETY.

CONTRIBUTORY — Evidence of allotment of shares - - - - 472
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COSTS—Administration action - - 1
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—— Lands Clauses Act - - - 316
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—— Patent action—Vexatious proceedings 224
See PATENT. 3.

—— Profit costs—Solicitor—Mortgagee - 524
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—— Security for - - - - 296
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—— Taxation—Solicitors' Remuneration Act 303
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—— Winding-up petition - - - 140
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COVENANT—*Lease—Restraint of Trade—"Trade of Retailer of Wine, Spirits or Beer."*] The lessee of a theatre bought an adjoining piece of ground, which was subject to a covenant, of which he had notice, that "the trade of an innkeeper, victualler, or retailer of wine, spirits or beer," should not be carried on there. He erected on this piece of ground a building the object of which was to furnish convenient egress from the theatre; but on each floor he set up a counter for selling wine, spirits and beer, which could not be approached directly from the outside, but at which any person who paid for admittance to the theatre when open for theatrical performances could purchase refreshments:—*Held* (affirming the decision of Kekewich, J.), that the lessee was carrying on the trade of a retailer of wine, spirits and beer, and must be restrained from doing so.—*Jones* v. *Bone* (Law Rep. 9 Eq. 674) distinguished. BUCKLE *v.* FREDERICKS - - C. A. 244

2 —— *Lease—Restrictive Covenant—Public-house—Covenant not to buy Beer except from Lessor or his Assigns—Covenant running with the Land—Assignment of Public-house and Covenant.*] Messrs. A. & B., who were brewers, and also dealers in ale and stout, carrying on their business at the X. Brewery, demised a public-house to the Defendant by an indenture of lease, in which the term "lessors" was defined to include each of the Messrs. A. & B., "and their each and every of their heirs, executors, administrators, and assigns," and the term "lessee" was defined to include the "executors, administrators, and permitted assigns" of the lessee.—The lease contained a covenant by the lessee with the lessors that he would not during the term, directly or indirectly, buy, sell, or dispose of upon the premises any ales or stout "other than such as shall have been bonâ fide purchased of the said lessors, or from them or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them, provided they or he shall at such time deal in or vend such liquors as aforesaid and be willing to supply the same to the lessee of good quality and at the fair current market price."—A. & B. afterwards sold and assigned their brewery, plant, business, and goodwill to C., a brewer carrying on business at the Y. Brewery, and assigned to him the public-house and the benefit of the covenant with reference to the sale of beer. About the same time A. & B. dissolved partnership, and ceased to carry on business at the X. Brewery, which was shortly afterwards shut up.—The Defendant did not take his beer from C., and in an action brought by A., B., and C., as co-Plaintiffs, to restrain the Defendant from selling any beer other than beer purchased from C., either directly or through A. & B., the Vice-Chancellor of the County Palatine Court of Lancaster, after holding that A. & B., having ceased to carry on business, were not entitled to relief, granted an injunction in favour of C. in the terms of the covenant.—On appeal by the Defendant, it was *held* by the Court:—First. Upon the construction of the covenant, that the benefit of it was not restricted either to assigns carrying on the same brewer's business as the lessors, or to assigns who themselves made beer.—Secondly. That the covenant was not a personal covenant incapable of assignment, but a covenant relating to the way in which the business at a particular house was to be carried on, and accordingly a covenant running with the land, and enforceable by the owner of the reversion on the lease.—Thirdly. That whether the covenant was one running with the land or not, the Plaintiff C., as assignee of the benefit of it, was, according to the principle of *Tulk* v. *Moxhay* (2 Ph. 774), entitled to enforce it, upon the ground that the Defendant, having presumably obtained a lease of the house at a lower rent by reason of the restrictive covenant, ought to be restrained from dealing with the house in a way inconsistent with that covenant.—In adjudicating upon covenants in the nature of restrictive covenants, where an affirmative covenant has a negative element in it, or where a covenant is partly affirmative and partly negative, the Court will in a proper case enforce the negative portion of the covenant.—*Doe* v. *Reid* (10 B. & C. 849) and *Haywood* v. *Brunswick Permanent Benefit Building Society* (8 Q. B. D. 403) distinguished.—*Dictum* of Baggallay, L.J., in *Lybbe* v. *Hart* (29 Ch. D. 8) questioned. CLEGG *v.* HANDS - - - - - 503

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DONATIO MORTIS CAUSÂ — *Banker's Deposit Note—Cheque indorsed on Deposit Note*] A testator who held a banker's deposit note for £580, in his last illness and very shortly before his death, took out the note, filled in and signed upon a stamp a form of cheque indorsed on the note, "pay self or bearer £580 and interest," and handed the document to a relation who was attending him in his illness, telling her that she was to give it back to him if he recovered, and if not she would be all right:—*Held* (affirming the decision of Kekewich, J.), that there was a valid donatio mortis causâ, for that, assuming a donatio mortis causâ of a cheque not presented in the drawer's lifetime to be invalid, the intention here was not merely to give the cheque but the deposit note; that a deposit note is a good subject of a donatio mortis causâ, and that the gift was not defeated by the giving the cheque along with the note.—*In re Mead* (15 Ch. D. 651) distinguished. *In re* DILLON. DUFFIN *v.* DUFFIN - C. A. 76

EASEMENT—*Exclusive Use of Gateway—Absolute Ownership.*] M. and others were owners in fee of a house fronting a street, and also of a yard and premises in rear of the house. A covered passage or gateway led from the street through the house to the premises in the rear. They conveyed the premises in the rear "together with the exclusive use of the gateway," which was described by its dimensions, to W. in fee:—*Held*, affirming the decision of Kekewich, J., that W. was entitled not merely to a right of way through the gateway, but to the use of the gateway for all lawful purposes.—*Semble*, such a right amounted to the ownership of the space within the gateway. REILLY *v.* BOOTH - - - C. A. 12

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FRAUDS, STATUTE OF—*Sufficient Memorandum—Two independent Documents—Parol Evidence to Connect—Specific Performance.*] H. agreed to sell to O. a freehold estate for £2375, and signed a memorandum which contained all the essentials of the contract except that it omitted to mention or refer to the property agreed to be sold. Two days afterwards O., pursuant to the contract, sent H. a cheque of £375 as a deposit and in part payment of the £2375, and H. replied by letter, "I beg to acknowledge receipt of cheque, value £375, on account of the purchase-money for the F. estate":—*Held*, that parol evidence was admissible to explain the circumstances under which the letter was written, and that, as such evidence connected the letter and the memorandum, the two documents read together constituted a sufficient memorandum within the Statute of Frauds. OLIVER *v.* HUNTING - - - - 205

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ILLEGALITY—Lottery - - - 306
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ILLEGITIMATE CHILDREN — Will—Construction - - - - - 590
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INFANT—*Marriage Settlement—Voidable*—37 & 38 *Vict. c.* 62.] A settlement of property made by an infant on her marriage is, as regards the infant, voidable and not void; and is not within either section of the Infants Relief Act, 1874.—Sect. 1 of that Act applies only to the three classes of contracts therein specified.—*Coxhead* v. *Mullis* (3 C. P. D. 439) and *Ex parte Jones* (18 Ch. D. 109, 122) observed upon. DUNCAN *v.* DIXON 211

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INTEREST—*Minerals wrongfully taken—Compensation, Interest on*—3 & 4 *Will.* 4, *c.* 42, *s.* 29—*Action for Money had and received—Claim for Interest made on Further Consideration.*] By the decree made in this suit in 1871 it was declared that the Defendants S. H. and R. F. and the estate of the deceased Defendant W. H. F., were answerable for all minerals gotten or removed from under the Plaintiffs' farm; and an inquiry was directed what quantities of minerals had been so gotten or removed, and it was ordered that the value at the pit's mouth of all minerals so gotten or removed with just allowances for carriage, but none for getting, should be certified.—After the decree the Defendants S. H. and R. F. died, and the suit was continued, so far as the inquiry was concerned, against their representatives.—The official referee having, in December, 1889, reported the value at the pit's mouth of the minerals taken to be £9028 6s. 0d., the Plaintiffs, upon the

INTEREST—*continued.*
further consideration of the suit, claimed to be entitled to interest on that amount with half-yearly rests, upon the grounds, first, that damages may be given in the nature of interest under 3 & 4 Will. 4, c. 42, s. 29, in all actions of trover or trespass de bonis asportatis, and that the suit was in effect an equitable action of trover, and secondly, that the Defendants, as accounting parties who had had the use of the Plaintiffs' money, were in the position of trustees thereof for them:—*Held* (1.) that the suit must be treated, not as an action of trover or trespass, but as an action for money had and received, to which the 29th section of 3 & 4 Will. 4, c. 42 did not apply; (2.) that no fiduciary relation existed between the parties; and (3.) that the claim, if made at all, ought to have been made and adjudicated upon at the hearing, and was too late when made upon further consideration; and held, consequently, that the Plaintiffs were not entitled to any interest upon the sum mentioned in the report.—*Dreyfus* v. *Peruvian Guano Company* (42 Ch. D. 66; 43 Ch. D. 316) distinguished. PHILLIPS *v.* HOMFRAY [694

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LANCASTER COURT—*Court of Chancery of County Palatine of Lancaster*—17 & 18 *Vict. c.* 82, *s.* 8—*Defendant out of the Jurisdiction—Transfer from Palatine Court to High Court.*] Persons who had assigned property in trust for their creditors brought an action in the Court of the County Palatine against the trustees and a purchaser from them, for accounts, and to impeach the sale, alleging fraudulent dealings by the trustees and a collusive sale at an undervalue. The property was within the jurisdiction of the Palatine Court, and all the parties resided within it at the time of the sale; but one of the trustees, whose conduct was especially impeached, had since gone to reside out of the jurisdiction of that Court. By leave of the Court of Appeal, service on him out of the jurisdiction of the Palatine Court was effected. He then applied to transfer the action to the High Court. The other Defendants, except a Defendant having a very small interest concurrent with that of the Plaintiffs, supported the application:—*Held*, without laying down any general rule, that the applicant being the principal Defendant, no sufficient reason was shewn in this case for obliging him to defend the action in the County Palatine, and that it ought to be transferred to the High Court. COOKE *v.* SMITH [C. A. 72

LANDLORD AND TENANT—*Assignment—Underlease—Rent—Common Obligation—Right of Contribution.*] A lessee of land assigned part of the land to A. for the residue of the term, and other part to B. for the residue of the term, less ten days, at apportioned rents, covenanting in both cases to pay the rent due to the original lessor and to indemnify.—The lessee having become bankrupt, A., on the application of the lessor and on threat of distraint, paid the whole rent under the original lease:—*Held*, that as A. and B. were not liable to a common demand and there being no one entitled to sue B. for his share of the rent, A. had no right of contribution as against B. JOHNSON *v.* WILD - - 146

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LANDS CLAUSES ACT—*Company or Public Body—Compulsory Purchase of Land—Payment of Purchase-money into Court—Subsequent Mortgage of Share—Petition for Payment out—Costs of Mortgagee—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80.] Land in settlement having been taken compulsorily by a public body under the Lands Clauses Consolidation Act, 1845, and the purchase-money paid into Court, a reversioner mortgaged his reversionary interest in the fund. After the death of the tenant for life a petition was presented for the payment of the money out of Court, and the mortgagee was served:—*Held*, that the public body must pay the costs of the mortgagee's appearance, those costs being limited to 42*s.*, and that they must also pay the costs of serving the mortgagee with the petition.—*In re Gough's Trusts* (24 Ch. D. 569) dissented from.—*Re Jones' Trust Estate* (18 W. R. 312) not followed. *In re* OLIVE'S ESTATE - - - - 316

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LUNATIC—*Necessaries—Maintenance—Implied Contract—Implied Obligation—Debt—Right to recover against Estate of Lunatic not so found—Payments for her Maintenance in excess of her own Income—Necessaries suitable to position in life of Lunatic.*] Whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property.—Accordingly an obligation may be implied on the part of a lunatic (whether so found or not) to repay a person who has supplied necessaries for him, when the necessaries supplied are suitable to the position in life of the lunatic. But the provision of money or necessaries must be made under circumstances which would justify the Court in implying the obligation, i.e., with the intention on the part of the person making the provision to be repaid for so doing, and to constitute a debt against the lunatic's estate.—A lady of unsound mind who was never found a lunatic, and whose income was under £96 a year, was confined from 1855 down to her death in 1881 in a private lun

LUNATIC—*continued.*
asylum at a cost of £140 a year.—Her brother received the income of her property, and applied it in part payment of the £140, paying the deficiency out of his own pocket until his death in 1875. After his death his son, who was his executor, continued to receive and apply the lady's income in the same manner, and the deficiency was made good partly by him and partly by his brother and sisters. No claim was ever made by any of these persons against the lady's estate during her life, nor did any of them appear to have kept any account against her.—After her death:—*Held*, by the Court of Appeal (affirming the decision of Kay, J.), that the deficiency was provided under circumstances from which no implied obligation could arise.—*Carter v. Beard* (10 Sim. 7) doubted.—*In re Weaver* (21 Ch. D. 615) explained. *In re* RHODES. RHODES *v.* RHODES - - - C. A. 94

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MEDIUM FILUM VIÆ—Railway—Limits of deviation - - - - 330
See RAILWAY COMPANY. 1.

MEMORANDUM OF ASSOCIATION—Objects of company—Construction - - 634
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MINERALS—Wrongfully worked—Compensation—Interest - - - 694
See INTEREST.

MORTGAGE—*Contract—Solicitor-Mortgagee—Costs—Charge—Future Costs—Profit Costs—Contract—"Clogging the Redemption."*] A deed of mortgage and further charge contained a recital that the mortgagees, who were a solicitor and an auctioneer, had taken transfers of certain mortgage debts at the request of the mortgagors, and on the terms that they should advance the money therefor, and "should be entitled to make the same charges and receive the same remuneration respectively for all business done by them respectively in and about these presents as they would have been entitled to make and receive if they had not been mortgagees." And the mortgagors covenanted to pay the existing mortgage debts, together with a further advance, and also "every other sum which may hereafter be advanced or paid by the mortgagees, or either of them, to or become owing to them or him by the mortgagors, or either of them; and the mortgagors charged the mortgaged property with the aggregate of the mortgage debts and further advance, and with any other sum as aforesaid. The mortgage money was advanced by the mortgagees as trustees, and prior to the mortgage, which was prepared by the solicitor-mortgagee, a valuation of the property was made by the auctioneer-mortgagee on the instructions of the solicitor. The mortgagees afterwards entered into possession.—*Held* (affirming the decision of Kay, J.), that in taking the mortgagees' accounts in a

MORTGAGE—*continued.*
foreclosure action the following charges ought to be disallowed—(1) for the costs of an order, made subsequent to the mortgage, appointing trustees under the Settled Land Act, 1882, for the purpose of leasing part of the mortgaged property; (2) for costs incurred by one of the mortgagors to the solicitor-mortgagee, as her solicitor, subsequently to the mortgage and in matters unconnected with it; and (3) a fee paid by the solicitor-mortgagee to the auctioneer-mortgagee for his valuation; the Court holding that the recital and covenant, read together, did not cover any of these charges.—Per Kay, J.:—As a mortgagee cannot charge his mortgagor with more than his principal, interest, and costs, he is not entitled to charge the mortgagor with any sum payable for his, the mortgagee's, own benefit, such as professional or profit costs for the preparation of the mortgage deed, if he is a solicitor, or for the valuation of the property for the purpose of the mortgage, if he is a surveyor; nor, on the principle that a mortgagee cannot clog the equity of redemption with any by-agreement, can he contract with the mortgagor for any such payment. FIELD *v.* HOPKINS - - C. A. 524

2. —— *Foreclosure—Successive Incumbrances—Annuitant—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 15—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 12—*Form of Order.*] The Plaintiffs in a foreclosure action were first mortgagees; the second incumbrancer was a jointress; the Plaintiffs were the third mortgagees; there were several subsequent mortgagees. An order was made giving the jointress six months to redeem; in case she did redeem, giving three months to the Plaintiffs, as third mortgagees, to redeem subject to the jointure, and a third period of three months to the subsequent incumbrancers, but if she did not redeem giving them a second period only of three months.—Liberty to apply was reserved to persons redeeming in respect of conveyance to trustees for them. SMITHETT *v.* HESKETH - - 161

3. —— *Power of Sale—Building Society—Notice—Waiver—Title—Mortgagor's Title—Conveyance—Contract to buy under Power of Sale—Confirmation—Validity of Title—Conveyancing and Law of Property Act*, 1881, *s.* 19, *sub-s.* 1 (i.), *s.* 20, *sub-s.* (i.).] A mortgage of leaseholds to the trustees of a building society, in the ordinary form of a building society mortgage, contained a covenant by the mortgagor to pay, as required by the rules of the society, all subscriptions, &c., in respect of his shares in the society, and also a declaration that, in case of default, the total sum for which the mortgage should be for the time being redeemable according to the said rules and the mortgage, should be considered as then actually due, and that the power of sale given to mortgagees by the Conveyancing and Law of Property Act, 1881, should apply. On the same day the mortgagor executed a second mortgage of the property to his bankers. The mortgagor subsequently became bankrupt; and the second instalment of subscription under the first mortgage being in arrear, the first mortgagees, a fortnight after the day on which the instalment had become due according to the rules of the society, and without

MORTGAGE—*continued.*

any formal notice to the second mortgagees or the mortgagor's trustee in bankruptcy, though with their knowledge and consent, put up the property for sale by auction subject to conditions of sale which stipulated that the purchaser should accept a conveyance from the vendors under their power of sale, without the concurrence of any other persons. The property not being sold at the auction, the first mortgagees, within three months from the date when the second instalment became due, and with the approval of the second mortgagees, sold the property by private contract, subject to the original conditions of sale. Upon the purchaser's requisition the mortgagor's trustee in bankruptcy consented to join in the conveyance; but subsequently the purchaser raised the objection that the first mortgagees could not make a title at all, as their power of sale was not exercisable until three months' notice had been first given under sect. 20, sub-s. (i.) of the Conveyancing Act. Upon a summons by the purchaser under the Vendor and Purchaser Act, 1874, the Chief Clerk made an order declaring that the vendors had shewn a good title according to the conditions of sale. The vendors had, after being served with the summons, offered to procure the concurrence of the second mortgagees in the conveyance, in addition to that of the mortgagor's trustee in bankruptcy, and the second mortgagees had expressed their willingness to concur. The purchaser moved to discharge the Chief Clerk's order on the ground that the power of sale was not exercisable for want of the three months' notice under the Act, and that he could not be required to accept a title from the second mortgagees, as offered by the vendors, since it had been stipulated by his contract that he should take a title from the first mortgagees only:—*Held*, that the conveyance by the first mortgagees would not be the less a conveyance by them under their power of sale, according to the contract, because the second mortgagees, either by the same or a separate deed, concurred in or confirmed the conveyance by passing such interest as they might have; and that the second mortgagees and the mortgagor's trustee in bankruptcy had in effect waived the notice required by the Act.—The Chief Clerk's order was accordingly affirmed with a preface that the second mortgagees and the trustee in bankruptcy were willing to concur in the conveyance or otherwise to confirm the sale, and that the vendors were ready and willing to procure such conveyance and confirmation at their own expense. Motion to discharge refused with costs.—What is "waiver" of notice, discussed.—*Selwyn v. Garfit* (38 Ch. D. 273) considered. *In re* THOMPSON AND HOLT - - - 492

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—— Patent—Registration—Parties to action for infringement - - - 374
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PARTICULARS OF OBJECTIONS—Patent action—Costs - - - - 224
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PATENT — *Assignment — Mortgage — Parties — Patent Office—Registration of Deed—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 87 — *Rules of Supreme Court*, 1883, *Order XVI., r.* 11.] V., the registered assignee of a patent, mortgaged it, and the mortgagee was registered "as mortgagee." After this, V. sued an infringer without making the mortgagee a party. The Defendant pleaded that V. was not the proprietor and could not sue. The mortgagee declined to be made a co-Plaintiff, and was not added as Defendant. Kekewich, J., dismissed the action on that ground, without going into the merits:—*Held*, on appeal, that as the mortgagee was not registered as assignee or proprietor, sect. 87 of the Patents, Designs, and Trade Marks Act, 1883, did not apply, and the case must be decided according to the general law as to mortgages, and that V. could sue without making the mortgagee a co-Plaintiff.—*Semble*, that even if the mortgagee had been registered as assignee or proprietor, sect. 87 would not be read as taking away the mortgagor's right to sue for infringement of the patent.—*Held*, that, if it had been necessary to have the mortgagee before the Court, it would not have been right to dismiss the action on the ground of his absence, but the Court ought to have made him a party under Order XVI., r. 11.—But, *held*, that it was not necessary at present to have him before the Court, and the order of Kekewich, J., was discharged, without prejudice to any application by the Defendant to have the mortgagee made a party, if circumstances should arise making it necessary. VAN GELDER, APSIMON & CO. *v.* SOWERBY BRIDGE UNITED DISTRICT FLOUR SOCIETY - C. A. 374

2. —— *Infringement—Measure of Damages—Remoteness—Loss by Reduction in Price by Patentees.*] In an action by patentees for infringement, the Plaintiffs obtained judgment, and an inquiry as to damages was referred to an Official Referee. The referee found by this report that the prices

PATENT—*continued.*

at which the Defendants at first sold the patented articles were lower than the Plaintiffs' original prices, and that they lowered them again from time to time during the period of infringement, and that the Plaintiffs reduced their prices to the prices of the Defendants from time to time to meet the competition of the Defendants, but never reduced them below the prices of the Defendants for the time being. He also found that, but for the illegal competition of the Defendants the Plaintiffs would have made all the sales made by the Defendants, as well as those made by themselves, at their original prices, subject to a per-centage for increased sales caused by the connection and exertions of the Defendants, and by the reduction of the prices. The Court held that the evidence justified the findings of the Official Referee:—*Held* (reversing the decision of Kekewich, J.), that the Plaintiffs were entitled to recover all the profits which would have been made by them if all the sales made by them and by the Defendants had been made by the Plaintiffs at their original prices; after making an allowance for the increased sales attributable to the connection and exertions of the Defendants and to the reduction in the prices.—*United Horse Shoe and Nail Company* v. *Stewart* (13 App. Cas. 401) considered and distinguished. AMERICAN BRAIDED WIRE COMPANY *v.* THOMSON **C. A. 274**

3. —— *Practice—Invalidity of Patent—Particulars of Objections—Successful Defendant—Costs — Certificate — Taxation — Set-off — "Improper, vexatious or unnecessary" proceedings—Condition Precedent—Patents, Designs, and Trade Marks Act,* 1883, *s.* 29, *sub-s.* 6—*Rules of Supreme Court,* 1883, *Ord. LXV., r.* 27, *sub-rr.* 20, 21.] Where a patent action, in which the Defendant has pleaded no infringement and also invalidity of the Plaintiff's patent, is dismissed with costs on the ground of no infringement alone—the Court not deciding the question of invalidity at all—and no certificate is given under sect. 29, sub-sect. 6, of the Patents, Designs, and Trade Marks Act, 1883, that the Defendant's particulars of objections to the validity of the patent were "reasonable and proper," so that on taxation his costs of the particulars are disallowed on the ground of the absence of such a certificate; the Plaintiff is not entitled, under Rules of Supreme Court, 1883, Order LXV., r. 27, sub-rr. 20, 21, to set off, as against the costs payable by him, costs incurred by him in consequence of the Defendant's particulars, whether the Defendant may at the trial have called evidence in support of them or not.—It is a condition precedent to a party being allowed under sub-rule 20 the costs occasioned to him by improper proceedings of the other party that there must have been a disallowance of the costs of the other party either by the Court or by the Taxing Master under sub-rule 20, on the ground that the proceedings were "improper, vexatious or unnecessary"; and disallowance of the Defendant's costs of particulars on the mere ground of the absence of the statutory certificate is insufficient to entitle the Plaintiff to the costs occasioned to him by them, and the Taxing Master cannot enter into the question whether the particulars were improper, as the Defendant's

PATENT—*continued.*

costs relating to them, being disallowed for want of a certificate, are not before him for taxation. GARRARD *v.* EDGE - - - - **C. A. 224**

4. —— *Threats of Legal Proceedings for Infringement—Action for Infringement—"Due diligence" in commencement and prosecution—Discontinuance—Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] In order that an action by the owner of a patent for the infringement of his patent should be "prosecuted with due diligence," within the meaning of the proviso to sect. 32 of the Patents, Designs, and Trade Marks Act, 1883, so as to exclude the operation of the former part of that section, it is not necessary that the infringment action should be prosecuted up to judgment. The Plaintiff will not lose the protection of the proviso by reason of his discontinuing the action before trial upon discovering that he has no cause of action.—*Semble*, that, primâ facie, if a threats action under sect. 32 is commenced against the owner of a patent by an alleged infringer, the Defendant will not be wanting in "due diligence" if he waits a reasonable time for the delivery of the statement of claim, in order that he may, if possible, raise the question of infringement by means of a counterclaim in the threats action, instead of incurring the expense of an independent action for infringement.—A threats action under sect. 32 was commenced against the owner of a patent by an alleged infringer on the 22nd of September, 1888. The threats were contained in a trade circular which had been circulated on the 15th of September. On the 6th of December, the Defendant in the threats action commenced an action against the Plaintiff for infringement of the patent. On the 8th of February, 1889, a statement of claim was delivered in the threats action, and on the 9th of March the statement of defence was delivered. On the 13th of May a statement of claim was delivered in the infringement action, the time for its delivery having been several times extended by consent. On the 6th of November the patentee discovered, by means of the report of an expert made under an order for inspection in the threats action, that there had been no infringement of the patent, and on the 7th of November he gave notice of discontinuance of the infringement action, and paid the Defendant's costs of it. At the trial of the threats action,—*Held*, that the infringement action had been commenced and prosecuted with "due diligence," and that, consequently, the proviso to sect. 32 applied, and the Plaintiff in the threats action had no cause of action under that section. COLLEY *v.* HART - - - - - - **179**

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POWER—*Perpetuity—Possibility on a Possibility—Legal Limitation—Limitation to unborn Person for Life with Remainder to her Children born before particular Period—Restraint on Anticipation—Testamentary Power of Appointment given to unborn Person—Appointment read into Settlement.*] The old rule against a "possibility on a possibility," applicable to legal limitations of real estate, namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers, is still existing, and has not been abrogated by the more modern rule against perpetuities, which prohibits property being tied up for a longer period than a life or lives in being and twenty-one years afterwards, with the addition of the period of an actually existing gestation—the two rules being in fact independent and co-existing.—By a post-nuptial settlement made in pursuance of ante-nuptial articles, freehold lands were limited to the use of the husband and wife successively for life with remainder to the use of their issue (born before any appointment made) as they should by deed appoint. Having had issue, two daughters only, they by deed appointed one moiety of the lands to the use of one daughter for life for her separate use without power of anticipation, and after her decease to the use of such person or persons as she should by will appoint, and in default of appointment to the use of her children living at the date of that deed equally as tenants in common in fee:—*Held* (affirming the decision of Kay, J.), that the only part of the appointment which was good was the limitation to the daughter for life for her separate use; the appointment being read into the settlement, and the latter being treated as having been made prior to the marriage of the husband and wife. WHITBY *v.* MITCHELL - - - - C. A. 85

POWER OF SALE—Mortgage—Notice to mortgagor - - - - 492
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—— Sale before power has arisen - - 218
See VENDOR AND PURCHASER. 1.

PRACTICE—*Attachment — Notice of Motion — Service where no Appearance—Filing—Rules of Supreme Court*, 1883, *Order* XLIV., *r.* 2; *Order* LXVII., *r.* 4.] A notice of motion for leave to issue a writ of attachment is sufficiently served where the party against whom the attachment is to be issued has not entered any appearance by filing with the proper officer, pursuant to Order LXVII., r. 4. *In re* MORRIS. MORRIS *v.* FOWLER [151

2. —— *Chambers — Evidence — Accounts — Cross-examination of Party—Close of Evidence.*] It is competent for the Judge to adopt a practice in Chambers excluding further evidence by a party after cross-examining on the evidence of the other side. *In re* DAVIES. ISSARD *v.* LAMBERT [C. A. 253

3. —— *Injunction — Undertaking as to Damages.*] An action was brought against M., L., and the N. B. Company, to restrain the company from confirming in general meeting certain agreements between the company and M. and L. An interim injunction was granted. M. asked

PRACTICE—*continued.*

for the usual undertaking as to damages, to which the Plaintiff's counsel replied that it would of course be given. L. had not been served, and did not appear. The Registrar drew up the order, with an undertaking confined to damages sustained by the company, and it was passed and entered in this form. M. and L. appealed, asking that the undertaking might be extended to damages sustained by them respectively:—*Held*, that as M. had applied for an undertaking as to damages which had been given, the order was wrong in not extending the undertaking to damages sustained by him, and must be corrected.—An undertaking as to damages is not to be confined to damages sustained by the party against whom the injunction is granted.—But *held* that, as L. had not applied for an undertaking, the undertaking could not be extended to include him, the Court having no jurisdiction to compel a party to give an undertaking.—*Held*, that an application to correct the order ought to have been made to the Court below, the Judge having jurisdiction to correct an order, though passed and entered, if it does not express what he intended, and that as extra expense was occasioned by coming to the Court of Appeal, no order would be made as to costs. TUCKER *v.* NEW BRUNSWICK TRADING COMPANY OF LONDON - - - - C. A. 249

4. —— *Official Referee—Entering up Judgment—Motion to set aside Judgment—Appeal—Jurisdiction—Judicature Act*, 1873, *s.* 57—*Rules of Supreme Court*, 1883, *Order* XXXVI., *rr.* 50, 52*a* (*Rules of Dec.* 1889).] When judgment has been actually entered up pursuant to a direction by the Official Referee under Rules of Supreme Court, 1883, Order XXXVI., rr. 50 and 52a (Rules of Dec. 1889), it is too late for the unsuccessful party to apply to a Court of First Instance to move by way of appeal to set aside the judgment; his proper course is to go direct to the Court of Appeal. SERLE *v.* FARDELL. - - 299

5. —— *Official Referee—Reference for Inquiry and Report—Form of Report—Application to remit—Judicature Act*, 1873, *s.* 56.] An Official Referee is not bound to take accounts and inquiries referred to him for report under Judicature Act, 1873, s. 56, in the strict way usually adopted before a Chief Clerk in Chambers; though he may adopt that method if he finds it convenient and likely to advance the ends of justice. Practice and method of taking accounts in Chambers and before an Official Referee stated, compared, and discussed. *In re* TAYLOR. TURPIN *v.* PAIN 128

6. —— *Originating Summons — Administration—Creditor—Annuitant—Proof for future Debt—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Rules of Supreme Court*, 1883, *Order* LV., *r.* 3.] A testator by deed covenanted with trustees to pay an annuity to a woman during her life, to be considered as accruing from day to day, by equal quarterly payments. The testator's estate was not sufficient to pay the estimated value of the annuity as well as his other debts and liabilities, and the trustees took out an originating summons under Order LV., r. 3, as creditors for administration of the estate. At the time when the summons was taken out no quarterly payment of the annuity was due:—*Held* (affirming the decision o

PRACTICE—*continued.*

North, J.), that the trustees of the annuitant were not creditors of the testator, and could not take out a summons for the administration of the estate; although if an administration order was obtained by some other person they would be entitled to prove for the estimated value of the annuity. *In re* HARGREAVES. DICKS *v.* HARE [C. A. 236

7. —— *Security for Costs—Married Woman.*] A married woman who has no separate property except property which she is restrained from anticipating, and who appeals without a next friend, must give security for the costs of the appeal. WHITTAKER *v.* KERSHAW - C. A. 296

8. —— *Transfer from Chancery Division to Court of Bankruptcy—Administration of Insolvent Estate—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-s.* 4.] The power given by the Bankruptcy Act, 1883, s. 125, sub-s. 4, to transfer the administration of an insolvent estate from the Chancery Division to the Court of Bankruptcy, is a discretionary power, and not a power which the Judge is bound to exercise whenever the estate is shewn to be insolvent.—The circumstance that the executor has a right of retainer and a liberty not to plead the Statute of Limitations to a debt, which rights would be recognized in the Chancery Division, but might be taken away by a transfer to the Court of Bankruptcy, is not a ground for the transfer.—Decision of Chitty, J., affirmed. *In re* BAKER. NICHOLS *v.* BAKER - C. A. 262

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PRINCIPAL AND SURETY—*Co-sureties—Counter-security given by Principal Debtor to one Co-surety—Payment of Principal Debt by all Co-sureties—Right to participate in Counter-security.*] One of several co-sureties, who obtains from the principal debtor a counter-security against the liability which he has incurred under the contract of suretyship, being, as was decided in *Steel* v. *Dixon* (17 Ch. D. 825), bound to bring into hotchpot for the benefit of his co-sureties whatever he receives by virtue of the counter-security:—*Held*, that, when by means of the counter-security the surety has been repaid what he has paid on account of the principal debt, and has shared the amount thus received by him with his co-sureties, he will be again entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again arise, and so on until the whole of the payments made by the co-sureties on account of the principal debt have been refunded, or the value of the counter-security has been exhausted.—Five sureties jointly and severally guaranteed to a banking company the balance owing to them by a customer on his current account, to the extent of £2000. Afterwards the principal debtor deposited with one of the sureties a policy of insurance on his own life, to secure that surety against all liability in respect of the suretyship. The principal debtor became bankrupt, owing more than £2000 to the banking company, and on their demand the five sureties paid them £2000 under the guarantee. The principal debtor afterwards died, and the policy money was received by the surety with whom the deposit had been made:—*Held*, that, inasmuch as that surety was bound to bring into hotchpot for the benefit of his co-sureties whatever he received out of the policy money in payment of the amount which he had paid under the guarantee, the deposit in effect enured for the benefit of all the co-sureties to the full extent of the principal debt, and that the policy money must accordingly be applied in repaying to the five co-sureties the amounts which they had respectively paid under the guarantee. BERRIDGE *v.* BERRIDGE - - - 168

PRIORITY—Mortgage of unpaid calls—Creditors in winding-up - - - 534
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PROMISSORY NOTE—*Payable on Demand—At Maturity—Express Waiver—Direction in writing to destroy—Renunciation—Bills of Exchange Act,* 1882, *ss.* 62, *sub-s.* 1, 89.] A promissory note payable on demand with interest from the date thereof, is a present debt, and "at maturity" as soon as given; and a written direction by the holder of such a note, that it be destroyed as soon as found, though given in articulo mortis, and because the note could not at the time be found to be cancelled or given back to the maker, is not an absolute and unconditional renunciation of the rights of the holder, within the provision of the Bills of Exchange Act, 1882, s. 62, sub-sect. 1. "The renunciation" "in writing" required by the statute must be in itself a record of the renunciation, not a memorandum or note of the renunciation or of an intention or desire to renounce. *In re* GEORGE. FRANCIS *v.* BRUCE [627

PUBLIC HEALTH ACT (38 & 39 *Vict. c.* 55), *s.* 4—"*Owner*"—*Receiver appointed by the Court—Service of Notices under the Act.*] The definition of "owner" in sect. 4 of the Public Health Act, 1875, does not include a receiver appointed by the Court; and so service of notices under sect. 150 of the Act on such receiver is not a good service. CORPORATION OF BACUP *v.* SMITH [395

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RAILWAY COMPANY—*Limits of Deviation—Statutory Powers—Widening of existing Line—Medium illum—Railways Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 20), *s.* 15—*Excess of Statutory Powers—Special Damage.*] Section 15 of the Railways Clauses Consolidation Act, 1845, as to the distance to which a railway company may deviate from the line delineated on the Parliamentary plans, and the decisions under that section to the effect that the distance

RAILWAY COMPANY—*continued.*

is to be measured from the medium filum viæ of the line of railway actually laid down to that of the line delineated on the plans, apply only to the construction of a new line of railway, and not to the widening of an existing line.—By a special Act a railway company were authorized to widen their existing railway, and on the Parliamentary plans the existing line of railway was delineated, and there were dotted lines on either side indicating the limits of deviation. The company constructed a portion of their widening outside the limits shewn by one of the dotted lines and upon land taken by them from the Plaintiff, who brought this action against them for an injunction, but did not shew that he had sustained any special damage by reason of their acts.—The land of the Plaintiff taken by the company was comprised in the Parliamentary plans and books of reference. It consisted of two dwelling-houses and their curtilages. The company first gave notice to take such parts of them as were within the limits of deviation, but after receiving a notice from the tenants under the 92nd section of the Lands Clauses Act, requiring them to take the whole of the tenements, and also a letter from the landlord refusing to give up any part which he was not compelled to sell, they gave a fresh notice to take the remainder of the two tenements:—*Held*, by Kay, J., upon the construction of the Act and reference to the plans, that the company were bound to construct their widening wholly within the limits of deviation, and had exceeded their powers in constructing it outside those limits;—But *held*, by Kay, J., and by the Court of Appeal, that assuming that the company had exceeded their powers in the construction of the widening, yet as the land taken was included in the Parliamentary plans and no special damage to the Plaintiff had been proved, the action could not be maintained:—*Held*, also, that as the two houses and curtilages were included in the Parliamentary plans and were under the circumstances reasonably necessary to be taken for the completion of the company's works, the company had the power to take them, although they were outside the limits of deviation, and that the notices were valid, notwithstanding the refusal of consent on the part of the landlord.—*Dowling* v. *Pontypool, Caerleon, and Newport Railway Company* (Law Rep. 18 Eq. 714) followed. FINCK *v.* LONDON AND SOUTH-WESTERN RAILWAY COMPANY - - - - - C. A. 330

2. —— *Scheme of Arrangement — Assent of Preference Shareholders — Shares divided into Preferred and Deferred Half Shares—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 6, 12.] A railway company were empowered by their Act to divide their ordinary shares into preferred and deferred half-shares, and a large number of their shares were divided accordingly. There was no other power in the Act to issue preference shares. The company filed a scheme of arrangement with their creditors under sect. 6 of the Railway Companies Act, 1867, to which they obtained the assent of the debenture-holders, and also of the ordinary shareholders (including the holders of preferred and deferred half-shares), at an extraordinary general meeting:—*Held*, that the holders of preferred half-shares did not form a class of preference shareholders whose separate assent must be obtained under sect. 12 of the Act. *In re* BRIGHTON AND DYKE RAILWAY COMPANY - - C. A. 28

3. —— *Scheme of Arrangement — Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127)—*Outside Creditors.*] A railway company which was unable to meet its engagements, and was heavily indebted to debenture-holders to whom a large arrear of interest was due, and who to a great extent could call for immediate payment of the principal, filed a scheme of arrangement which provided that the arrears of interest on debentures should not be paid, but be funded and carry interest—that the debenture-holders should not call for payment of principal for ten years—that if within that time any specifically mortgaged property should be realized, one-half of the surplus proceeds should be applied in redemption of deferred debenture stock created under the scheme, and the other half carried to the secured interest reserved fund—that the income of the company should be applied in payment of interest on debentures, debenture stock, and funded interest, and subject thereto in payment of interest on deferred debenture stock—that all available funds on a certain day and outstanding items then due to the company should be carried to the secured interest reserved fund, and that such fund should be applicable to payment of interest on debentures and debenture stock (except deferred debenture stock), and interest on funded interest (except funded interest on deferred debenture stock), and that the company should have power to liquidate debts to unsecured creditors by the issue of deferred debenture stock at par, which was to be subject to the prior debentures and debenture stock. A large unsecured creditor opposed the confirmation of this scheme on the ground that it appropriated all the free assets of the company to which an unsecured creditor could have recourse, and that it gave the company power to prefer some creditors to others, as it did not bind the company to issue deferred debenture stock to all unsecured creditors who applied for it:—*Held* (affirming the decision of Chitty, J.), that the scheme appeared to be honestly framed with a view to the benefit of all parties, and that no sufficient objection was shewn to its confirmation, as it did not purport to bind outside creditors, and its appropriation of the free assets could not be complained of by outside creditors who had no lien on them, and it was to be presumed that the company would exercise honestly and fairly the power of issuing deferred debenture stock to unsecured creditors. *In re* EAST AND WEST INDIA DOCK COMPANY - - - - C. A. 38

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RIVER—*Highway—Public Right of User for Boating—Right of Way or of Recreation—Cul-de-sac—User, whether Permissive or of Right—Affidavits—Duty of Commissioner.*] The river M. was a non-tidal tributary of the Thames. The flow of the M. on its course to the Thames was obstructed by a mill-dam, and in order to bring boats from the Thames on to the part of the M. above the dam, it was necessary to take them out of the water and carry them over private land. The M. above the dam flowed under bridges, first at C., and then at E.; and the part of the river between the bridge at C. and the dam was not a way from one public place to another, had never been used as a waterway except for purposes of pleasure and recreation, and its depth and capacity for boating traffic depended on the existence of the dam.—The Plaintiff, who was the owner of an estate lying on both sides of this part of the M., obstructed the waterway of the river where it flowed through his land with posts and chains. The Defendant, who was not a riparian proprietor, but who had for eight years previously kept boats on a piece of land not belonging to him and let them out for hire, pulled down the obstruction, and justified this act on the ground that this part of the M. was a highway. The Plaintiff brought this action for an injunction to prevent his obstruction being interfered with, and the Defendant counter-claimed for an injunction to restrain any hindrance to the passage of his boats.—From the evidence it appeared that there had been no maintenance of the waterway by any person, with the exception of dredging by the owner of the mill, that as far back as living memory went there had been boating upon this part of the river by the riparian proprietors and their friends, that subsequently, by degrees and at first quite secretly, a few persons living on the bank began to take remuneration for lending their boats, not making any charge, but receiving what the borrower chose to give, that thenceforth the growing practice of boating for pleasure, including fishing, had not been effectively interfered with until the Plaintiff put his obstruction across the stream, though notices had been put up near the

RIVER—*continued.*
river warning persons against trespassing in boats for fishing or otherwise; but there was no evidence which could establish any public right of fishing:—*Held*, that the claim of the Defendant must be treated as if it were a claim to establish a right of highway on dry land; that, so considered, the claim in effect was to impose on land a new servitude, or establish a highway on conditions which were inconsistent with a right of that kind; that the true inference from the evidence was that the use made of this part of the river had been permissive and not as of right; but that even if the boating of the public was not permissive the Defendant had not proved that this part of the river was a highway; that the Plaintiff was therefore entitled to maintain his obstruction as against the Defendant, and that an injunction must be granted to restrain the Defendant from interfering with it.—A right of recreation by custom upon the land of another cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district.—The riparian owners might possibly be able to establish a private right of way, or a right of boating for recreation for themselves and their friends by custom, but the existence of such a right or custom, if established, would not entitle the public to boat on the river or support the claim that it was a highway.—*Quære*, where a lake in private grounds, touched at one point only by a public road, can be subjected to a right which will make it a highway by persons launching boats from the road on it for pleasure.—*Marshall* v. *Ulleswater Steam Navigation Company* (Law Rep. 7 Q. B. 166) considered.—Consideration of the circumstances under which a cul-de-sac may be a highway.—Observations as to the duty of commissioners to administer oaths where a witness is swearing to the contents of an affidavit. BOURKE *v.* DAVIS [110

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SOLICITOR—*Costs—Taxation—Attempted ineffectual Sale of Real Estate—General Order under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *r.* 2 (*c*), *Sched. I. Part* 1, *r.* 2, *Sched. II.*] The costs of an attempted ineffectual sale of property, when there is no probability of the sale being effected for some years to come, should be taxed under rule 2 (*c*) of the General Order made in pursuance of the Solicitors' Remuneration Act, 1881. *In re* SMITH, PINSENT & CO. - 303

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TRADE-MARK — *Registration — Infringement—Registration of Mark for one Class of Goods—Right to prevent Use of Mark for another Class of Goods—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *ss.* 62, 65, 70, 77—*Trade Marks Registration Act*, 1875 (38 & 39 *Vict.* c. 91).] The registration of a trade-mark for one class of goods does not entitle the registered proprietor to prevent another person from using the mark in connection with goods included in a

TRADE-MARK—*continued.*

different class.—The Plaintiff registered a trade-mark for the goods included in Class 6 in the first schedule to the Rules under the Trade Marks Registration Act, 1875—that is, "Machinery of all kinds, and parts of machinery, except agricultural machines included in Class 7."

In his application for registration, the Plaintiff stated that the article in connection with which the mark was to be used was a "toilet requisite, being a machine to hold a reel of perforated paper."—The Plaintiff sold both the machines and the reels or rolls of paper, which were intended to be used together. The two things could, however, be purchased separately. When a roll of paper had been used up, another could be fixed in the machine. The Plaintiff did not place the mark upon the machine, but he placed it on the wrappers in which his rolls of paper were sold. The Defendant sold similar rolls of paper with the same mark on the wrappers:—*Held*, that, paper not being included in Class 6, the registration did not entitle the Plaintiff to prevent the Defendant from using the mark in connection with his rolls of paper; but on the evidence an injunction was granted to restrain the Defendant from passing off his goods as the Plaintiff's. HART *v.* COLLEY - - - - 193

TRANSFER OF PROCEEDINGS—Administration of insolvent estate—Court of Bankruptcy *See* PRACTICE. 8. [262

—— Palatine Court of Lancaster - - 72
See LANCASTER COURT.

TRUSTEE—Consent to marriage—Condition—Will - - - - - 654
See WILL. 1.

ULTRA VIRES ACT—Building society—Powers of directors - - - - 412
See BUILDING SOCIETY. 2.

UNDERLEASE—Part of land—Apportioned rent—Contribution - - - 146
See LANDLORD AND TENANT.

VENDOR AND PURCHASER—*Contract—Title—Trustees having no immediate Power of Sale—Concurrence of Tenant for Life under Settled Land Acts.*] Vendors contracted to sell land as trustees for sale and the purchaser paid a deposit. Upon investigation of the title it appeared that the vendors had no power of sale until the death of an existing tenant for life. The purchaser objected to the title, and the vendors thereupon offered to procure a conveyance from the tenant for life under the powers of the Settled Land Acts. The purchaser declined to enter into a new contract with the tenant for life, and took out a summons under the Vendor and Purchaser Act, 1874, for the return of the deposit:—*Held* (affirming the decision of Kay, J.), that the vendors were not entitled to compel the purchaser to enter into a new contract with the tenant for life, and that they must repay to him the deposit with interest at 4 per cent., and his costs of investigating the title. *In re* BRYANT AND BARNINGHAM'S CONTRACT. [C. A. 218

2. —— *Contract by Letters—Specific Performance — Offer to Sell — Withdrawal — Time.*] Although two letters standing alone might be evidence of a sufficient contract, yet a negotiation for an important term of purchase and sale carried on afterwards is enough, on the principle of *Hussey v. Horne-Payne* (4 App. Cas. 311), to shew that the contract was not complete.—An offer to sell property may be withdrawn at any time before acceptance, even though a period is stated during which the offer is to remain open.—M., a baker, on the 29th of May, 1889, wrote to G., a director of an Aërated Bread Company, the following letter:—"I beg to submit to you the following conditions for disposal of my business carried on at 15, Duke Street, Cardiff. Lease and goodwill, £450 (lease from the 29th of September, 1888, for fourteen years). All fixtures, fittings, utensils, &c., stock-in-trade connected with the premises to be taken at valuation. Yours truly, R. M. This offer to hold good for ten days."—On the 1st of June, 1889, G. replied: "I accept your offer for shop and lease, &c., 15, Duke Street, Cardiff. Yours truly, J. G. (for B., C., and S. Aërated Bread Company). Mr. R. M."—M.'s solicitor then sent G. a formal memorandum of agreement comprising several terms not expressed in the two letters. The company's solicitors added a clause restricting M. from carrying on a similar business within certain limits. A correspondence then followed between the solicitors for the company and for M. respecting the terms of the memorandum, and on the 7th of June, 1889, M.'s solicitor wrote withdrawing the offer.—In an action by the company against M. for specific performance of the contract alleged to be constituted by the two original letters:—*Held*, that, although those two letters would, if nothing else had taken place, have been sufficient evidence of a complete agreement, yet the company had themselves shewn that the agreement was not complete by stipulating afterwards for an important additional term, namely, the restriction on M.'s carrying on business, which kept the whole matter of purchase and sale in a state of negotiation only; and that M. was therefore at liberty to put an end to the negotiations by withdrawing his offer, though within the ten days mentioned in his letter. BRISTOL, CARDIFF, AND SWANSEA AERATED BREAD COMPANY *v.* MAGGS - - - - 616

—— Contract to sell under power of sale—Waiver of notice by mortgagor - 492
See MORTGAGE. 3.

VESTING—Will—"From and after" - 154
See WILL. 4.

WAIVER—Notice—Sale by mortgagee - 492
See MORTGAGE. 3.

WAY—Grant of exclusive use of - - 12
See EASEMENT.

WILL—*Construction—Condition—Marriage with Consent of Trustees.*] A testator bequeathed residuary personal estate in trust for his son during his life or until his marriage, and from and after his marriage "with the consent of at least two of the trustees for the time being" in trust for his son absolutely. After the testator's death his son made a verbal request to the trustees of the will

WILL—*continued.*

for their consent, and they desired him to make his application in writing. The son then applied in writing for their consent; and the trustees replied that they were prevented from taking any action, as they had been told that the lady had declined his proposal. The marriage took place, and in the course of proceedings to determine the question whether there had been a consent within the terms of the bequest, the trustees deposed that at the time of the son's verbal application they had no objection to the marriage, but were of opinion that it was not at that time desirable:—*Held*, that the consent of the trustees had been substantially given within the principle of *Daley* v. *Desbouverie* (2 Atk. 261), and that the son was absolutely entitled to the residuary personal estate. *In re* SMITH. KEELING *v.* SMITH - **654**

2. —— *Construction—Gift to Next of Kin of Person dead at date of Will—Period of ascertainment of Class—Statute of Distributions—Lapse.*] A widow by her will bequeathed personal estate "to such person or persons as would have become entitled to my said husband's personal estate under or by virtue of the Statute of Distributions had he died intestate and without leaving any widow him surviving." The statutory next of kin of the husband at the time of his death were M. S. and R. R., both of whom were alive at the date of the will, but M. S. died before the testatrix:—*Held*, that the words "without leaving any widow him surviving" took the case out of the general rule laid down in *Wharton* v. *Barker* (4 K. & J. 483, 502) and that the persons to take must be ascertained, not at the death of the testatrix, but at the death of the husband, and consequently that there was a lapse as to the share of M. S. *In re* REES. WILLIAMS *v.* DAVIES - - - - - **484**

3. —— *Construction—Gift to Persons named for Life and to their Children—Residuary Gift to "Relatives named" who are entitled to a "Transmissible Interest"—Wife's Nieces—Illegitimate Relatives.*] A testator gave his general estate to his executors and directed them to set apart the sums specified for the benefit of certain persons by name, some of whom he described as his cousins and others as his nieces, during their respective lives, and after their deaths for their children; and he gave his residuary estate to be equally divided among such of "his relatives thereinbefore named" as by virtue of the provisions of his will should become entitled to a vested transmissible interest in any part of his property. The persons described as the testator's nieces were his wife's nieces, not his own; and some of the persons

WILL—*continued.*

described as his cousins were illegitimate relatives:—*Held*, by Stirling, J., that the words "a transmissible interest" meant an interest transmissible after death, and that those legatees who took only a life estate were excluded from participation in the residue:—*Held*, by the Court of Appeal (reversing the decision of Stirling, J., upon these points), that upon the true construction of the will, the words "relatives named" included relatives by affinity as well as consanguinity, and illegitimate as well as legitimate relatives; and also persons described as children of legatees named in the will, although not themselves specially named.—Observations as to the province of authorities on questions of construction. *In re* JODRELL. JODRELL *v.* SEALE **C. A. 590**

4. —— *Construction—Vesting—"From and after."*] A testator gave a house to his trustees, upon trust to permit his daughter E. to receive the rents thereof for her life; "and from and after her decease the same premises shall be in trust for all the children of E., in equal shares, as tenants in common, on their respectively attaining the age of twenty-one years."—The will contained no direction as to the application of the rents of the house after the death of E., and during the infancy of her children. E. had only one child, a daughter, who survived her mother, and died under twenty-one unmarried:—*Held*, that, notwithstanding the use of the words "from and after," the children of E. did not take vested interests until they attained twenty-one.—*Andrew* v. *Andrew* (1 Ch. D. 410) distinguished. *In re* JOBSON. JOBSON *v.* RICHARDSON - - - - - - **154**

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